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IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

PACIFIC HARDWARE & STEEL COMPANY, a Corporation,

Plaintiff in Error,

VS.

ALONZO L. MONICAL,

Defendant in Error.

On Writ of Error to the United States District
Court, For the District of Oregon.

TRANSCRIPT OF RECORD.

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PACIFIC HARDWARE & STEEL COMPANY, a Corporation,

Plaintiff in Error,

VS.

ALONZO L. MONICAL,

Defendant in Error.

Names and Addresses of Attorneys upon this Writ:

For the Plaintiff in Error:

Messrs. Platt & Platt,

Palmer L. Fales,

Board of Trade Bldg., Portland, Ore.

For the Defendant in Error:

Henry St. Rayner,

Chamber of Commerce Bldg., Portland, Ore.

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*In the District Court of the United States for the
District of Oregon.*

Be it remembered, that on the 30 day of April, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Transcript on Removal, in words and figures as follows, to-wit:

Be it remembered that heretofore on the 10th day of August, 1911, there was filed in the office of the Clerk of the Circuit Court of the County of Multnomah, State of Oregon, a complaint in words and figures as follows, to-wit:

[Complaint.]

*In the Circuit Court of the State of Oregon,
for Multnomah County.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE AND STEEL COMPANY,
a Corporation,

Defendant.

The above named plaintiff complains of the above named defendant, and for cause of action against it alleges:

I.

That the defendant, on the 25th of March, 1911, was and now is a corporation organized, incorporated and existing under the laws of the State of California, and engaged in the hardware, steel and iron business in the City of Portland, State of Oregon.

II.

That the defendant, on said 25th of March, 1911, was engaged, in connection with carrying on its said hardware, steel and iron business in the City of Portland, State of Oregon, in operating and using a certain large delivery truck, known as an auto-truck, the same being propelled and run by power generated by gasoline and a gasoline engine. And said auto-truck was then and there used by the defendant for the purpose of carrying and delivering steel, iron and other hardware to its customers in said City of Portland.

III.

That the defendant, on said day, had in its employ for the purpose of and who was engaged in operating and running said auto-truck in the City of Portland aforesaid a certain servant, known as Harry Kelly, who was then and there as such servant engaged in carrying steel and iron in said auto-truck and delivering the same to the customers of the defendant.

IV.

That said servant, Harry Kelly, on said day, had not obtained and did not have a certificate or license from the proper Municipal officials of the City of Portland, Oregon, to entitle or authorize him, under the law, to operate and run said auto-truck, and he was then and there unlawfully engaged in operating and running said auto-truck for said defendant, as its servant, in violation of the Ordinance of the City of Portland, Oregon, "No. 17036," entitled "An Ordinance Regulating and Licensing the Operation of Automobiles, Auto-cars and Other Similar Vehicles, Within the Corporate Limits of

the City of Portland," approved October 10th, 1907, and in violation of said Ordinance as amended by the Ordinance of said City "No. 17852" and contained in "Charter and Ordinances of the City of Portland, Oregon, 1910," from page 587 to page 596 inclusive, without a license or certificate therefor as required by said Ordinances, and was an incompetent and unqualified person to operate the same. That the defendant, well knowing that the said Harry Kelly had not received a license or certificate from the proper Municipal officials of the City of Portland, Oregon, to entitle and authorize him to operate and run said auto-truck in said City, and was incompetent and unqualified to operate and run the same as aforesaid, negligently and carelessly employed him on said day as its servant to operate and run said auto-truck in said City of Portland to carry and deliver iron and steel to its customers.

V.

That on said 25th of March, 1911, at about 11:30 o'clock A. M., the plaintiff was standing against the wooden railing on the north side of the road-way, known as and being the road-way from Water Street to Supple's Dock, situate on the east side of the Willamette River in the City of Portland, Oregon; and while plaintiff was so standing, and then and there engaged in talking to one Captain John Nelson, the defendant, by its said servant, carelessly and negligently operated and ran said auto-truck, while it was loaded with several bars of heavy steel or iron, known as angle-iron, being about 30 feet in length, and which protruded behind the back portion of said auto-truck a distance of about

16 feet, along said road-way from Water Street aforesaid in the direction of said Supple's Dock, and when passing the plaintiff, the defendant, by its said servant, carelessly and negligently omitted to ring a bell, blow a horn or whistle, or sound a gong, and without giving any signal or warning, carelessly and negligently operated and turned said auto-truck toward the southwest portion of said roadway at a highly dangerous and unsafe rate of speed with the intention of passing through a certain gate-way or opening about 16 feet in width on the south side of said road-way, known as the entrance from said road-way to the premises of the East Side Boiler Works, the east side of said gate-way or opening being on a line about 22 feet west of the place where plaintiff was standing aforesaid, and defendant thereby, while so operating and running said auto-truck, by said servant, without any fault or negligence on the part of plaintiff, carelessly and negligently struck the plaintiff with said protruding angle-iron in a violent manner and knocked him through said railing and down upon several logs lying a distance of about 20 feet below said railing, and by reason of which the plaintiff was rendered insensible and sustained the following injuries, to-wit:

(1) The large bone of his left arm, known as the humerus, was broken.

(2) One of the lower bones of his left fore-arm, known as the radius, was broken close to the wrist joint.

(3) One of his ribs on the left side of the body was broken.

(4) His left lung was injured, from which he has been emitting and spitting blood since the said injury,

and said lung has been permanently and irreparably impaired.

(5) His left hip, left hip joint, and left leg were severely injured, and the muscles and tissues thereof bruised and impaired.

(6) His left shoulder was severely injured, and the muscles and tissues thereof bruised and impaired.

(7) His left hip, left hip joint, left leg, left shoulder, left wrist and left hand are permanently and irreparably injured, stiffened and impaired, and the muscles and tissues of the left shoulder have become shrunken and atrophied.

(8) The left side of his face and left ear were severely injured so that the use and hearing of said ear is impaired.

(9) The left side of his face, left thigh, and left leg, were bruised, contused and injured so that by reason thereof he suffers from a numbness or semi-paralysis of the nerves and tissues of the left side of his face and of the nerves and tissues of his left thigh and leg.

(10) He received and is suffering from a severe internal injury on the right side of his body.

(11) In consequence of said injuries, his memory has become affected and impaired.

(12) By reason of said injuries, his general physical health and constitutional condition, which at all times previous to said injuries were good, have been irreparably impaired, and he has been reduced in flesh since said injury from 206 pounds to 172 pounds in weight.

(13) By reason of said injuries, from and since said 25th of March, 1911, he has been and is now unable

to lie or rest on either his right or left side, and unable to obtain normal rest and sleep at night, and suffers acutely from insomnia and want of rest.

VI.

That by reason of said injuries, plaintiff is permanently and entirely incapacitated from performing any manual or other labor to earn a livelihood.

VII.

That by reason of said injuries, the plaintiff has from and since the 25th of March, 1911, endured acute physical pain and suffering, and great mental pain, anguish and suffering.

VIII.

That by reason of said injuries, the plaintiff will be compelled in the future to employ nurses and physicians to care for and treat him, and incur expenses therefor in a large sum now unknown to plaintiff.

IX.

That by reason of the injuries aforesaid, the plaintiff has suffered and been damaged by the defendant in the sum of Seventy Five Thousand Dollars.

X.

That by reason of said injuries, the plaintiff has been unable to perform any labor since said 25th of March, 1911, and has therefore lost in wages usually earned by him at his customary vocation, the sum of \$75.00 monthly, and has thereby been specially damaged by the defendant in the sum of \$337.50.

XI.

That by reason of said injuries, the plaintiff has been

compelled to incur expenses for physicians and nurses to examine and treat him for said injuries in the sum of \$———, and has thereby been damaged by the defendant specially in the sum of \$———.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$75337.50, and for his costs and disbursements herein.

HENRY ST. RAYNER,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Alonzo L. Monical, being first duly sworn, depose and say that I am the plaintiff in the above entitled action; and that the foregoing complaint is true as I verily believe.

(Signed) ALONZO L. MONICAL,
[Notarial Seal.]

Subscribed and sworn to before me this 10th day of August, 1911.

HENRY ST. RAYNER,
Notary Public for the State of Oregon.

And afterwards, on the 28 day of August, 1911, there was filed in said office a summons in words and figures as follows, to-wit:

[Summons.]

[Title.]

To PACIFIC HARDWARE and STEEL COMPANY, a corporation:

Defendant.

In the Name of the State of Oregon: You are hereby required to appear and answer the complaint filed against you in the above entitled action within ten days from the date of the service of this summons upon you, if served within this county, or if served within any other county of the state, then within twenty days from the date of the service of this summons upon you; and if you fail to answer for want thereof, the plaintiff will apply to the Court for and take judgment against you in the sum of \$75337.50, and for his costs and disbursements herein, as prayed for in said complaint.

HENRY ST. RAYNER,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, R. L. Stevens, sheriff of said state and county, do hereby certify that I served the within Summons within said state and county, on the 21st day of August, 1911, on the within named defendant Pacific Hardware & Steel Company, a corporation, by personally delivering a copy thereof prepared and certified to by Henry St. Rayner, attorney for the plaintiff, together with a copy of the complaint prepared and certified to by Henry St. Rayner, attorney for the plaintiff, to A. C. Callan, statutory agent and attorney in fact for the said defendant corporation personally and in person.

R. L. STEVENS,
Sheriff of Multnomah county, State of Oregon.

By R. F. BEATTY,
Deputy.

Received 12:45 P. M., August 10, 1911.

R. L. STEVENS,

Sheriff of Multnomah county, Oregon.

By W. B. H.,

Deputy.

And afterwards, on the 28 day of August, 1911, there was filed in said office a petition for removal in words and figures, as follows, to-wit:

[Title.]

To the Honorable Judges of the Circuit Court of the State of Oregon, for the County of Multnomah:

Your petitioner respectfully shows:

I.

That, at all of the times mentioned in the complaint, on file herein, and at the time of the commencement of the suit, the Pacific Hardware & Steel Company was, and now is, a corporation created, organized and existing under and by virtue of the laws of the State of California, and, at all the times mentioned in said complaint, at the commencement of this suit, was, and now is, a citizen of the State of California and a resident and inhabitant thereof.

II.

That, at all the times mentioned in said complaint, and at the commencement of this suit, the plaintiff was, and now is, a citizen of the State of Oregon and a resident and inhabitant thereof.

III.

That this controversy is wholly between citizens of different states, namely between the plaintiff, a citizen

of the State of Oregon, and the defendant, a citizen of the State of California, and this controversy is wholly of a civil nature and the amount in controversy exceeds the sum of Two Thousand (\$2,000.) Dollars, exclusive of costs, and is, to-wit, the sum of Seventy-Five Thousand Three Hundred Thirty-Seven Dollars and Fifty Cents (\$75,337.50), together with the plaintiffs costs and disbursements herein.

Your petitioner desires to remove this cause into the United States Circuit Court for the District of Oregon and petitions the Court herewith for and order of removal and offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States for the District of Oregon.

PACIFIC HARDWARE & STEEL CO.,

By A. C. CALLAN, Atty. in Fact and Manager,

Petitioner.

PLATT & PLATT,

PALMER L. FALES,

Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, A. C. Callan, being first duly sworn, depose and say that I am manager and attorney in fact for Oregon of the Pacific Hardware & Steel Company, a corporation, defendant herein in the above entitled, and that the foregoing petition is true as I verily believe.

A. C. CALLAN.

Subscribed and sworn to before me this 26th day of August, 1911.

C. G. BUCKINGHAM,
Notary Public for Oregon.

(L. S.)

Due service of the within petition by certified copy as prescribed by law, is hereby admitted at Portland, Oregon.

8-28-11.

HENRY ST. RAYNER,
Of Attorneys for Plaintiff.

And afterwards, on the 28th day of August, 1911, there was filed in said office a bond in words and figures as follows, to-wit:

[Bond.]

[Title.]

Know All Men By These Presents, That we, Pacific Hardware & Steel Company, a corporation, as principal, and American Surety Company, a corporation, as surety, are held and firmly bound unto Alonzo L. Monical in the penal sum of One Thousand (\$1,000.) Dollars, for which

payment well and truly to be made unto the said Alonzo L. Monical, his administrator, executor and assigns, we hereby bind ourselves and our successors, jointly and severally, firmly by these presents.

Upon condition nevertheless that, whereas the said Pacific Hardware & Steel Company has filed its petition in the Circuit Court of the State of Oregon for the County of Multnomah, for the removal of a certain cause therein pending, wherein the said Alonzo L. Monical is plaintiff and the said Pacific Hardware & Steel Company is defendant to the Circuit Court of the United States in and for the District of Oregon:

Now, if the said Pacific Hardware & Steel Company shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In Witness Whereof, the said Pacific Hardware & Steel Company, a corporation, and the American Surety Company, a corporation, have hereunto placed their corporate names and seals by their duly authorized agents, this day of August, 1911.

PACIFIC HARDWARE & STEEL COMPANY,

By A. C. CALLAN,
Manager.

AMERICAN SURETY COMPANY.

By W J. LYONS,

Resident Vice President.

Attest: A. EDWARD KRULL,

Resident Ass't. Secretary.

[Corporate Seal.]

W. J. LYONS,

Agent.

Due service of the within bond by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, 8-28-11.

HENRY ST. RAYNER,

Of Attorneys for Plaintiff.

And afterwards, on the 30th day of August, 1911, there was filed in the said office a bond in words and figures as follows, to-wit:

[Bond.]

[Title.]

Know All Men By These Presents, That we, Pacific Hardware & Steel Company, a corporation, under the laws of the State of California, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York and, by compliance with the surety laws of the State of Oregon, authorized to engage in the surety and bonding business in the State of Oregon, as surety, are held and firmly bound unto Alonzo L. Monical in the penal sum of One Thousand (\$1,000.) Dollars, for which payment well and truly to be made unto the said Alonzo L. Monical, his admin-

istrator, executor and assigns, we hereby bind ourselves and our successors, jointly and severally, firmly by these presents.

Upon condition nevertheless that, whereas the said Pacific Hardware & Steel Company has filed its petition in the Circuit Court of the State of Oregon for the County of Multnomah for the removal of a certain cause therein pending wherein the said Alonzo L. Monical is plaintiff and the said Pacific Hardware & Steel Company is defendant to the Circuit Court of the United States in and for the District of Oregon:

Now, if the said Pacific Hardware & Steel Company shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In Witness Whereof, the said Pacific Hardware & Steel Company, a corporation, and the American Surety Company of New York, a corporation, have hereunto placed their corporate names and seals by their duly authorized agents, thisday of August, 1911.

PACIFIC HARDWARE & STEEL COMPANY,

By A. C. CALLAN,

Manager.

AMERICAN SURETY COMPANY OF NEW YORK,

By W. J. LYONS,
Resident Vice President.

Attest: A. EDWARD KRULL,
Resident Ass't. Secretary.

W. J. LYONS,
Agent.

And afterwards, on Wednesday, the 30th day of August, 1911, the same being the 74th judicial day of said term of said Court there was rendered and entered in said Court an order in words and figures as follows, to-wit:

[Order.]

[Title.]

Now at this time, this cause coming on to be heard, the defendant appearing by Platt & Platt and Palmer L. Fales, its attorneys of record; and

It appearing to the Court that the complaint herein was filed with the Clerk of this Court on the day of August, 1911, and that the complaint and summons were served upon the defendant herein on the 21st day of August, 1911, and the defendant herein having, within the time provided by law to answer said complaint, to-wit: on the 28th day of August, 1911, filed its petition for removal of this cause to the Circuit Court of the United States for the District of Oregon, which petition alleged as follows:

“To the Honorable Judges of the Circuit Court of the State of Oregon, for the County of Multnomah:
Your petitioner respectfully shows:

I.

That, at all of the times mentioned in the complaint, on file herein and at the time of the commencement of the suit, the Pacific Hardware & Steel Company was, and now is, a corporation created, organized and existing under and by virtue of the laws of the State of California, and, at all the times mentioned in said complaint, at the commencement of this suit, was, and now is, a citizen of the state of California and a resident and inhabitant thereof.

II.

That, at all the times mentioned in said complaint, and at the commencement of this suit, the plaintiff was, and now is, a citizen of the State of Oregon and a resident and inhabitant thereof.

III.

That this controversy is wholly between citizens of different states, namely between the plaintiff, a citizen of the State of Oregon, and the defendant, a citizen of the State of California, and this controversy is wholly of a civil nature and the amount in controversy exceeds the sum of Two Thousand (\$2,000.) Dollars, exclusive of costs, and is, to-wit, the sum of Seventy-Five Thousand Three Hundred Thirty-Seven Dollars and Fifty Cents (\$75,337.50), together with the plaintiff's costs and disbursements herein.

Your petitioner desires to remove this cause into the United States Circuit Court for the District of Oregon and petitions the Court herewith for an order of removal and offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the

United States on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States for the District of Oregon.

PACIFIC HARDWARE & STEEL CO.,

By A. C. CALLAN,

Atty. in Fact and Manager.

Petitioner

PLATT & PLATT,

PALMER L. FALES,

Attorneys for Defendant."

and

It appearing to the Court from said petition so filed that said cause is one within the jurisdiction of the Circuit Court of the United States and one subject to removal thereto from the Circuit Court of the State of Oregon; and

It further appearing that, at the time of the filing of said petition and of the same date therewith, the above named defendant filed a good and sufficient bond in the sum of One Thousand (\$1,000.) Dollars with the American Surety Company, a good and sufficient surety, pursuant to the statute and conditioned according to law;

Now, therefore, this Court does hereby accept and ap-

prove said bond and accept said petition, and does order that this cause be removed for trial to the next Circuit Court of the United States for the District of Oregon pursuant to the Statute of the United States, and that all other proceedings in this Court be stayed.

HENRY E. MCGINN,

Judge.

Dated at Portland, Oregon, this 30th day of August, 1911.

*In the District Court of the State of Oregon for the
County of Multnomah.*

State of Oregon,

County of Multnomah,—ss.

I, F. S. Fields, county clerk and ex-officio clerk of the Circuit Court of the State of Oregon for the County of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries, constituting all the proceedings had in case of Alonzo L. Monical. plaintiff, vs. Pacific Hardware Steel Comapny, a corporation, defendant, have been compared by me with the originals thereof and that they are true and correct transcripts of such original pleadings, papers, orders and journal eutries, as the same appear of record and on file at my office and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court the 31st day of August, 1911.

F. S. FIELDS,

Clerk.

By H. C. SMITH,

Deputy.

[Endorsed]: No. 3849. United States Circuit Court, District of Oregon,. Alonzo L. Monical vs. Pacific Hardware & Steel Co. Transcript on removal from Multnomah county. Filed September 30th, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 2 day of October, 1911, there was duly filed in said Court, a notice of removal in words and figures as follows, to-wit:

[Notice of Removal.]

*In the Circuit Court of the United States, for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation,

Defendant.

To Mr. HENRY ST. RAYNER, Attorney for Plaintiff:

You are hereby notified that, on the 30th day of August, 1911, by an order of the Circuit Court of the State of Oregon for the County of Multnomah, the above entitled cause was duly removed from the said Court to the Circuit Court of the United States for the District of Oregon, and a transcript of the record in said Court was filed in said Circuit Court of the United States on the 30th day of September, 1911.

PLATT & PLATT,

PALMER L. FALES,

Attorneys for Defendant.

Dated September 30th, 1911.

[Endorsed:] Notice of Removal. Filed October 2, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 21 day of November, 1911, there was duly filed in said Court, an answer in words and figures as follows to wit:

[Answer.]

*In the Circuit Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

Comes now the above named defendant, and for answer to plaintiff's complaint, admits paragraphs I, II and III thereof, and denies each and every other allegation, matter or thing therein contained.

And defendant for a first further and separate answer and defense to said complaint, alleges as follows:

I.

That the defendant, on the 25th day of March, 1911, was, and now is, a corporation organized, incorporated and existing under the laws of the State of California, and engaged in the hardware, steel and iron business in the City of Portland, State of Oregon.

II.

That the defendant on the said 25th day of March, 1911, was engaged, in connection with carrying on its said hardware, steel and iron business in the City of Portland, State of Oregon, in operating and using a

certain large delivery truck, known as an auto-truck, the same being propelled and run by power generated by gasoline and a gasoline engine. And said auto-truck was then and there used by the defendant for the purpose of carrying and delivering steel, iron and other hardware to its customers in said City of Portland.

III.

That the defendant, on said day, had in its employ for the purpose of, and who was engaged in, operating and running said auto-truck in the City of Portland aforesaid, a certain servant known as Harry Kelly, who was then and there, as such servant, engaged in carrying steel and iron in said auto-truck and delivering the same to the customers of the defendant.

IV.

That said servant, Harry Kelly, on or about the —— day of February, 1911, and prior to the accident hereinafter described, presented himself at the office of the Board of Automobile Registry for the City of Portland, and more particularly to the Deputy Auditor, acting as clerk and agent of said Board, and requested instructions upon the matter of the necessity of his having a chauffeur's license under ordinance of the City of Portland "No. 17036," entitled "An Ordinance Regulating and Licensing the Operation of Automobiles, Auto-Cars and Other Similar Vehicles, Within the Corporate Limits of the City of Portland," approved October 10, 1907, as amended by the Ordinance of the City of Portland "No. 17852," and contained in "Charter and Ordinances of

the City of Portland. Oregon, 1910," from page 587 to 596, and stated to said clerk that he was a chauffeur for the Pacific Hardware and Steel Company, a corporation, and as such chauffeur, he was engaged in driving and operating an auto-truck, which truck was used by said company only for the purpose of making free deliveries to its own customers in the City of Portland, at which time he was advised by said clerk that the said Board of Auto Registry and the Auditor of the City of Portland interpreted said Ordinance to mean that, under the facts as related by said Harry Kelly, a chauffeur's license was not necessary, and further that, at that time, said Board had not gotten as far down the alphabet as the name of said company, and that if, when they got to that point in the alphabet, they determined that a chauffeur's license would be necessary, they would notify him, all of which was known to the defendant prior to the 25th day of March, 1911.

V.

That said Harry Kelly, or the defendant, never received any notice from said Board or from its clerk.

VI.

That said servant, Harry Kelly, was at the date of his employment as chauffeur by the defendant, and upon the 25th day of March, 1911, an expert, experienced and careful chauffeur, very competent and fully qualified to operate the auto-truck of the defendant, all of which was determined by the defendant by careful investigation prior to the date of his employment.

VII.

That on the 25th day of March, 1911, at about 11:30 o'clock, A. M., said servant, Harry Kelly, was engaged in delivering for the defendant, certain pieces of angle-iron about 26 feet long, to the East Side Boiler Works, a customer of the defendant, whose place of business was, upon said date, located on the south side of a certain plank road-way, about twenty feet wide, extending from the west line of East Water Street, in a westerly direction, past the entrance of said East Side Boiler Works to Supple's Dock, in the City of Portland.

VIII.

That the said East Side Boiler Works was, on said 25th day of March, 1911, lessee of the Willamette and Columbia River Towing Company, a corporation, which company was, on said date, the owner of the property occupied by said boiler works, and of the land under said road-way, and that said road-way was, on said date, the private road-way of the Willamette and Columbia River Towing Company and Mr. Joseph Supple, and had been constructed by them prior to the 25th day of March, 1911, and had been maintained and repaired by said owners from the date of its construction to and including the 25th day of March, 1911.

IX.

That the only entrance to said East Side Boiler Works was a certain gate-way or opening about sixteen feet in width on the south side of said road-way, and about one hundred sixty (160) feet in a westerly direction from the west line of said East Water Street.

X.

That the said East Side Boiler Works, in ordering said angle-iron from the defendant, had stipulated that it should be delivered to their plant, and had given this defendant license to drive and operate its auto-truck along said road-way and into the opening to said East Side Boiler Works, for the purpose of delivering said angle-iron.

XI.

That on the 25th day of March, 1911, at about 11:30 o'clock A. M., the plaintiff herein, with one Captain John Nelson, was standing against a wooden railing on the north side of said road-way, on a line about twenty feet east of the aforesaid gate-way or opening to the East Side Boiler Works, which railing extended from a point about twenty feet west of the west line of East Water Street to a point about two and one-half or three feet west of the position then occupied by the plaintiff and Captain John Nelson, at which point said road-way was about eighteen or twenty feet above the ground, and that there was no railing along said road-way for about eighteen or twenty feet west of their said position, and that said position was a highly dangerous one to occupy; and that said plaintiff and said Captain John Nelson were then and there engaged in an idle conversation.

XII.

The plaintiff was, on said date, a night watchman for the steamer "Shaver," and that the plaintiff, or Captain John Nelson, were not at said time engaged in any duty for themselves or for their employers, but were idly passing their time in conversation.

XIII.

That the plaintiff and Captain John Nelson were at said place and time, trespassers upon the said private road-way.

XIV.

That at said time, the defendant's servant, Harry Kelly, in making the delivery aforesaid with the auto-truck of the defendant, turned off of East Water Street onto said private road-way, and proceeded at a very low rate of speed, not to exceed two and one-half miles an hour, in a very careful and prudent manner, to the above described opening or gate-way of the East Side Boiler Works, during which time the engine of said auto-truck was running on the low gear with a large amount of noise, and the wheels of said auto-truck were also making a great amount of noise as they ran over the planking of the road-way, which noise was sufficient to notify, and did notify, the plaintiff and Captain John Nelson of the approach of said auto-truck.

XV.

That when said servant, Harry Kelly, approached to a point about one hundred feet east of said gate-way, he turned said auto-truck to the north side of said road-way, close to the said railing, so that he might turn said auto-truck into the said gate-way.

XVI.

That the method hereinbefore described and used by said Harry Kelly was the only method that could be used by him, and the only course that could have been traveled by said auto-truck in making an entrance to said gate-way.

XVII.

That said plaintiff was at the time of the accident hereinafter referred to, about sixty years old, and was as aforesaid, at the time of said accident, employed as night watchman upon the steamer "Shaver," and was well familiar with the private road-way hereinbefore described, and with the gate-way and means of access to the East Side Boiler Works, and with the custom of using said private road-way in going to and from the plant of the said East Side Boiler Works.

XVIII.

That the plaintiff voluntarily and negligently trespassed upon, placed himself, and remained at, the north edge of said private road-way, at a point about twenty feet above the ground, and next to the gap in the guard railing along said north side of said private road-way, which he knew, or should have known, to be a highly dangerous position, and then and there failed to exercise reasonable and ordinary care for his own safety, and failed to use his natural faculties to protect himself from danger, and knowing, or being in a position where he should have known, of the approach of said auto-truck, and knowing, or being in a position where he should have known, of the intention of said auto-truck to turn into said gate-way, and knowing, or being in a position where he should have known, that he was in the natural path of said auto-truck and any load that it might carry, in turning into said gate-way, carelessly and negligently, and without making use of his natural faculties to avoid injury to himself, and failing to use reasonable and ordinary care for his own safety, made no attempt

to remove himself from his dangerous position, and because of his own negligence in trespassing upon said portion of said private road-way, and in voluntarily and negligently placing himself, and remaining, in a dangerous position, and in failing to exercise reasonable and ordinary care for his own safety, and in failing to use his natural faculties to protect himself from danger, said plaintiff was injured by coming in contact with the load carried by, and protruding from and over the rear end-board of said auto-truck, and that each and all said acts and omissions of the plaintiff were the direct and approximate cause of said accident and injury, and said accident happened by reason of the negligence and want of care of the plaintiff, and without any negligence on the part of the defendant, or its servant, Harry Kelly.

XIX.

That this is the same accident referred to in the plaintiff's complaint, and that said accident happened as alleged in this answer, and not otherwise.

An defendant for a second further and separate answer and defense to said complaint, alleges as follows:

I.

That the defendant, on the 25th day of March, 1911, was, and now is, a corporation organized, incorporated and existing under the laws of the State of California, and engaged in the hardware, steel and iron business in the City of Portland, State of Oregon.

II.

That the defendant on said 25th day of March, 1911, was engaged, in connection with carrying on its said hardware, steel and iron business in the City of

Portland, State of Oregon, in operating and using a certain large delivery truck, known as an auto-truck, the same being propelled and run by power generated by gasoline and a gasoline engine. And said auto-truck was then and there used by the defendant for the purpose of carrying and delivering steel, iron and other hardware to its customers in said City of Portland.

III.

That the defendant, on said day, had in its employ for the purpose of, and who was engaged in, operating and running said auto-truck in the City of Portland aforesaid, a certain servant known as Harry Kelly, who was then and there, as such servant, engaged in carrying steel and iron in said auto-truck and delivering the same to the customers of the defendant.

IV.

That said servant, Harry Kelly, on or about the —— day of February, 1911, and prior to the accident hereinafter described, presented himself at the office of the Board of Automobile Registry for the City of Portland, and more particularly, to the Deputy Auditor, acting as clerk and agent of said board, and requested instructions upon the matter of the necessity of his having a chauffeur's license under ordinance of the City of Portland "No. 17036," entitled "An Ordinance Regulating and Licensing the Operation of Automobiles, Auto-Cars and Other Similar Vehicles, Within the Corporate Limits of the City of Portland," approved October 10, 1907, as amended by the ordinance of the City of Portland "No. 17852," and contained in "Charter and Ordinances of the City of Portland, Oregon, 1910," from

page 583 to page 596, and stated to said clerk that he was a chauffeur for the Pacific Hardware and Steel Company, a corporation, and as such chauffeur, he was engaged in driving and operating an auto-truck, which truck was used by said company only for the purpose of making free deliveries to its own customers in the City of Portland, at which time he was advised by said clerk that the said Board of Auto Registry and the auditor of the City of Portland interpreted said ordinance to mean that, under the facts as related by said Harry Kelly, a chauffeur's license was not necessary, and further that, at that time, said board had not gotten as far down the alphabet as the name of said company, and that if, when they got to that point in the alphabet, they determined that chauffeur's license would be necessary, they would notify him, all of which was known to the defendant prior to the 25th day of March, 1911.

V.

That said Harry Kelly, or the defendant, never received any notice from said board or from its clerk.

VI.

That said servant, Harry Kelly, was at the date of his employment as chauffeur by the defendant, and upon the 25th day of March, 1911, an expert, experienced and careful chauffeur, very competent and fully qualified to operate the auto-truck of the defendant, all of which was determined by the defendant by careful investigation prior to the date of his employment.

VII.

That on the 25th day of March, 1911, at about 11:30 o'clock A. M., said servant, Harry Kelly, was engaged in

delivering for the defendant, certain pieces of angle-iron about twenty-six feet long, to the East Side Boiler Works, a customer of the defendant, whose place of business, was, upon said date, located on the south side of a certain plank road-way, about twenty feet wide, extending from the west line of East Water Street, in a westerly direction, past the entrance to said East Side Boiler Works, to Supple's Dock, in the City of Portland.

VIII.

That the only entrance to said East Side Boiler Works was a certain gate-way or opening about sixteen feet in width on the south side of said road-way, and about one hundred sixty (160) feet in a westerly direction from the west line of said East Water Street.

IX.

That on the 25th day of March, 1911, at about 11:30 o'clock A. M., the plaintiff herein, with one Captain John Nelson, was standing against a wooden railing on the north side of said road-way, on a line about twenty feet east of the aforesaid gate-way or opening to the East Side Boiler Works, which railing extended from a point about twenty feet west of the west line of East Water Street to a point about two and one-half or three feet west of the position then occupied by the plaintiff and Captain John Nelson, at which point said road-way was about eighteen or twenty feet above the ground, and that there was no railing along said road-way for about eighteen or twenty feet west of their said position, and that said position was a highly dangerous one to occu-

py; and that said plaintiff and said Captain John Nelson were then and there engaged in an idle conversation.

X.

That plaintiff was on said date a night watchman for the steamer "Shaver," and that the plaintiff, or Captain John Nelson, were not at said time engaged in any duty for themselves or for their employers, but were idly passing their time in conversation.

XI.

That at said time, the defendant's servant, Harry Kelly, in making the delivery aforesaid with the auto-truck of the defendant, turned off of East Water Street on to said road-way, and proceeded at a very low rate of speed, not to exceed two and one-half miles an hour, in a very careful and prudent manner, to the above described opening or gate-way of the East Side Boiler Works, during which time the engine of said auto-truck was running on the low gear with a large amount of noise and the wheels of said auto-truck were also making a great amount of noise as they ran over the planking of the road-way, which noise was sufficient to notify, and did notify, the plaintiff and Captain John Nelson of the approach of said auto-truck.

XII.

That when said servant, Harry Kelly, approached to a point about one hundred feet east of said gate-way, he turned said auto-truck to the north side of said road-way, close to the said railing, so that he might turn said auto-truck into the said gate-way.

XIII.

That the method hereinbefore described and used by said Harry Kelly was the only method that could be used by him, and the only course that could have been traveled by said auto-truck in making an entrance to said gate-way.

XIV.

That said plaintiff was at the time of the accident hereinafter described, about sixty years old, and was, as aforesaid, at the time of said accident, employed as a night watchman upon the steamer "Shaver," and was well familiar with the road-way hereinbefore referred to, and with the gate-way and means of access to the East Side Boiler Works, and with the custom of using said road-way in going to and from the plant of the said East Side Boiler works.

XV.

That the plaintiff voluntarily and negligently placed himself, and remained at, the north edge of said road-way, at a point about twenty feet above the ground, and next to the gap in the guard railing along said north side of said road-way, which he knew, or should have known, to be highly dangerous position, and then and there failed to exercise reasonable and ordinary care for his own safety, and failed to use his natural faculties to protect himself from danger, and knowing, or being in a position where he should have known, of the approach of said auto-truck, and knowing, or being in a position where he should have known, of the intention of said auto-truck to turn into said gate-way, and knowing,

or being in a position where he should have known, that he was in the natural path of said auto-truck, and any load that it might carry, in turning into said gateway, carelessly and negligently, and without making use of his natural faculties to avoid injury to himself, and failing to use reasonable or ordinary care for his own safety, made no attempt to remove himself from his dangerous position, and because of his own negligence in voluntarily and negligently placing himself, and remaining, in a dangerous position, and in failing to exercise reasonable and ordinary care for his own safety, and in failing to use his natural faculties to protect himself from danger, said plaintiff was injured by coming in contact with the load carried by, and protruding from and over the rear end-board of said auto-truck, and that each and all said acts and omissions of the plaintiff were the direct and proximate cause of said accident and injury, and said accident happened by reason of the negligence and want of care of the plaintiff, and without any negligence on the part of the defendant, or its servant, Harry Kelly.

XVI.

That this is the same accident referred to in plaintiff's complaint, and that said accident happened as alleged in this answer, and not otherwise.

Wherefore, defendant prays judgment that this action may be dismissed, and for his costs and disbursements herein.

PLATT & PLATT,
PALMER L. FALES,
Attorneys for Defendant.

United States of America,
District of Oregon,—ss.

I, A. C. McCallan, being first duly sworn, depose and say that I am managing agent, resident manager and attorney in fact for Oregon of the defendant corporation in the above entitled cause, and that the foregoing answer is true as I verily believe.

A. C. CALLAN,

Subscribed and sworn to before me this 21 day of November, 1911.

FRANK B. THOMPSON,

Notary Public in and for the State of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within answer by certified copy, as by law required, is hereby acknowledged at Portland, Oregon, this 21 day of November, 1911.

HENRY ST. RAYNER,

Of Attorneys for Plaintiff.

[Endorsed:] Answer. Filed November 21, 1911.
G. H. Marsh, Clerk.

And afterwards, to-wit, on the 24 day of November, 1911, there was duly filed in said Court, a reply in words and figures as follows, to-wit:

[Reply.]

*In the Circuit Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

The above named plaintiff for reply to the answer of the above named defendant filed herein admits and denies as follows:

I.

Admits paragraphs "I," "II," "III," "VII," and "IX" of the defendant's first further and separate answer and defense.

II.

Admits paragraphs "I," "II," "III," "VII," and "VIII" of defendant's second further and separate answer and defense.

III.

Admits that plaintiff, on the 25th of March, 1911, at about 11:30 o'clock A. M., with one Captain John Nelson, was standing against a wooden railing on the north side of the road-way to Supple's Dock referred to in the complaint on a line about twenty feet east of the gate or opening to the East Side Boiler Works.

IV.

Admits that the said road-way at said point is about twenty feet above the ground, below it.

V.

Admits that the plaintiff at said time, was engaged as a night watchman for the steamer "Shaver."

VI.

Admits that plaintiff was injured by the angle-iron carried by and protruding from and over the rear end of the auto-truck of defendant striking him as alleged in the complaint.

VII.

Denies that the plaintiff had sufficient knowledge or information to form a belief as to each and every of the allegations contained in paragraphs "IV," "V" and "X" of said first further and separate answer and defense, and therefore denies each and every of said allegations.

VIII

Denies that plaintiff has sufficient knowledge or information to form a belief as to each and every of the allegations contained in paragraphs "IV" and "V" of defendant's second further and separate answer and defense, and therefore denies each and every of said allegations.

IX.

Denies each and every allegation contained in said answer of defendant, save and except such as have been hereinbefore expressly admitted.

Wherefore, plaintiff prays for judgment as prayed for in his complaint herein.

HENRY ST. RAYNER,

Attorney for Plaintiff.

State of Oregon,

County of Multnomah,—ss.

I, Alonzo L. Monical, being first duly sworn, depose and say that I am the plaintiff in the above entitled action; and that the foregoing reply is true as I verily believe.

ALONZO L. MONICAL,

Subscribed and sworn to before me this 23rd day of
November, 1911.

[Seal] HENRY ST. RAYNER,
Notary Public for the State of Oregon.

[Endorsed:] Reply. November 24, 1911. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 4 day of January, 1912,
there was duly filed in said Court, an order, in
words and figures as follows to-wit:

[Order Allowing Amendment to Complaint.]

*In the District Court of the United States for the
District of Oregon.*

[Order.]

ALONZO L. MONICAL,

Plaintiff,

VS.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

Now at this time, this cause coming on for hearing, upon motion of the plaintiff for permission to amend his complaint herein by inserting on page 6 of the complaint, and immediately preceding the prayer, an additional paragraph, numbered XII; and,

It appearing to the Court that the original of said proposed paragraph XII was served upon the attorneys for the defendant and filed herein, on this 4th day of January, 1912, under a separate cover from the original complaint; and,

It appearing to the Court after presentation and argument by the attorneys for the respective parties, that the motion should be allowed in part and denied in part;

Now, Therefore, It Is Hereby Considered, Ordered, and Adjudged that the plaintiff be permitted to amend his complaint by inserting on page 6 of the complaint, and immediately preceding the prayer, the additional paragraph numbered XII which was filed under separate cover on this 4th day of January, 1912, except so much thereof as appears on page 1 beginning with the word "and" in line 13 and ending with the word "Oregon" in line 17, which last mentioned exception shall be stricken from said paragraph and said paragraph XII shall be taken as denied by the defendant.

CHAS. E. WOLVERTON,

Judge.

Dated at Portland, Ore., this 4th day of January, 1912.

[Endorsed]: Order. Filed January 4, 1912. A. M. Cannon, Clerk.

And afterwards, to-wit, on the 4 day of January, 1912, there was duly filed in said Court, an Amendment to Complaint, in words and figures as follows to-wit:

[Amendment to Complaint.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

The above named plaintiff moves the Court for permission to amend his complaint herein by inserting the following paragraph on page "6" of the complaint immediately preceding the prayer, to-wit:

"XII

"That the road-way hereinbefore referred to, on said 25th of March, 1911, and for several years immediately preceding said time, was used by the public generally as a road-way for vehicles and pedestrians to pass and repass from East Water Street to the wharves and docks known as Supple's Dock and the wharf and premises of the Willamette And Columbia River Towing Company, a corporation. And said road-way, at said time, was constructed upon a public street of the City of Portland, Oregon, known as East Yamhill Street, and was and is a public road-way of the City of Portland, Oregon. And the plaintiff for several years preceding immediately said 25th of March, 1911, had been in the habit of using said road-way, and was, on said day, at the time of receiving said injuries, using the same by the invitation and permission of the City of Portland and of Joseph Supple and the said Willamette and Columbia River Towing Company, the owners of said docks, wharves and premises, and was rightfully there at said time.

HENRY ST. RAYNER,

Attorney for Plaintiff.

State of Oregon,

County of Multnomah,—ss.

I, Alonzo L. Monical, being first duly sworn, depose and say that I am the plaintiff in the above entitled

action; and that the foregoing proposed amendment to the complaint herein is true as I verily believe.

(Signed) ALONZO L. MONICAL.

Subscribed and sworn to before me this 4th day of January, 1912.

[Seal] (Signed) HENRY ST. RAYNER,
Notary Public for the State of Oregon.

[Endorsed]: Amendment to Complaint. Filed January 4, 1912. A. M. Cannon, Clerk.

And afterwards, to-wit, on Thursday, the 4 day of January, 1912, the same being the 50 Judicial day of the Regular November, 1911, Term of said Court; Present: the HONORABLE CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Jury Empaneled.]

*In the District Court of the United States for the
District of Oregon.*

No. 3849

January 4, 1912.

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

This cause came on regularly for trial at this time; Henry St. Raynor, Esq., appearing on behalf of plaintiff and R. T. Platt, Esq., appearing on behalf of de-

fendant, and thereupon the following named persons were duly empaneled and sworn as a jury in said cause, i. e.: E. P. Carter, W. H. Markell, Chas. A. Wilson, Fred J. Haines, C. W. Cruse, William Rider, G. W. Waldron, Herbert Greenland, James F. Kertchen, Olaf M. Dahl, Fred Hampton, H. D. Schmeltzer, and thereupon A. L. Monical, J. E. Nelson, Nick Turpin and G. J. Smale were duly sworn and examined as witnesses on behalf of plaintiff, and the hour of adjournment having arrived the further trial of this cause is continued until Friday, January 5, 1912, at 10 A. M.

And afterwards, to-wit, on Friday, the 5 day of January, 1912, the same being the 51 Judicial day of the Regular November, 1911, Term of said Court; Present: the HONORABLE CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Motion for Non-Suit Denied.]

*In the District Court of the United States for the
District of Oregon.*

No. 3849

January 5, 1912.

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY,
Defendant.

This cause came regularly on at this time; attorneys present as before and trial proceeded with and thereupon W. C. Cohen, John R. Kelso, A. F. Johnson, Joseph Supple, Wm. E. Jones, George Warner, G. M. Magruder, E. F. Monical, W. C. Monical, B. L. Norden, E. J. Labbi, Elizabeth Durland, B. S. Durland, Bessie Kelso, were sworn and examined as witnesses on behalf of plaintiff and thereupon plaintiff rests and thereupon defendant moves for nonsuit and thereupon after argument of attorneys for respective parties, motion submitted, and thereupon after due consideration it is Ordered that said motion be, and the same is hereby, overruled. And thereupon H. H. Kelley, James Brown, R. R. Whiting, James V. McDonald, George F. Wilson were examined and sworn as witnesses on behalf of the defendant. And the hour of adjournment having arrived the further trial of said cause is continued until Saturday, January 6, 1912, at 10 A. M.

And afterwards, to-wit, on Saturday, the 6 day of January, 1912, the same being the 52 Judicial day of the Regular November, 1911, Term of said Court; Present: the HONORABLE CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Motion for Directed Verdict
Denied.]

*In the District Court of the United States for the
District of Oregon.*

No. 3849

January 6, 1912.

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY,

Defendant.

This cause come on regularly, at this time, attorneys present as before, and the trial was proceeded with, and thereupon F. L. Fales, H. G. Calton were sworn and examined on behalf of the defendant, and thereupon F. B. Jones was recalled and examined on behalf of the defendant and thereupon defendant rests; and thereupon A. F. Johnson was recalled and examined on behalf of plaintiff and thereupon the evidence being closed defendant moved that the Court direct a verdict for the defendant and thereupon after argument of counsel for respective parties the motion was submitted and after due consideration it is ordered that said motion for a directed verdict be, and the same is, overruled and upon consent of counsel, leave is hereby granted for the jury to view the premises involved herein, on Monday, January 8, 1912; and thereupon the jurors empaneled in this cause be and they are hereby excused until Monday, January 8, 1912, at 9:30 A. M. And thereupon further trial of this cause is continued until Monday, January 8th, 1912, at 10 A. M.

And afterwards, to-wit, on Monday, the 8 day of January, 1912, the same being the 53 Judicial day of the Regular November, 1911, Term of said

Court; Present: the HONORABLE CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Entry of Judgment.]

*In the District Court of the United States for the
District of Oregon.*

No. 3849

January 8, 1912.

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY,
Defendant.

Now, at this time, pursuant to order of adjournment, attorneys present as before, and thereupon the jury in custody of the bailiffs of this court, having viewed the premises where the accident occurred were returned into court and the trial proceeded with, and thereupon after arguments of counsel for respective parties and the charge and instructions of the court the jury, in charge of the proper officers of the court retired to consider of the verdict. And thereupon said jury returned into court the following verdict: "We, the jury duly empaneled and sworn to try the issues in the above entitled case, do hereby find for the plaintiff, and assess his damages in the sum of Eight Thousand and No (\$8000.00) Dollars. W. H. Markell, foreman of the jury", which verdict is received by the Court and ordered to be filed; it is therefore ordered

and adjudged that plaintiff have and recover of and from the defendant the sum of Eight Thousand (\$8000.00) Dollars, together with the costs and disbursements of this action taxed at \$172.15.

And afterwards, to-wit, on the 8 day of January, 1912, there was duly filed in said Court, a Verdict, in words and figures as follows to-wit:

[Verdict.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

We, the jury duly empaneled and sworn to try the issues in the above entitled case, do hereby find for the plaintiff, and assess his damages in the sum of Eight Thousand and No-100 (\$8000.00) Dollars.

W. H. MARKELL,
Foreman of the Jury.

[Endorsed]: Filed Jan. 8th, 1912. A. M. Cannon,
Clerk. By F. H. Drake, Deputy.

And afterwards, to-wit, on the 2 day of May, 1912, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows to-wit:

[Bill of Exceptions.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
Corporation,

Defendant.

Be It Remembered that the above entitled cause came on for hearing in the District Court of the United States for the District of Oregon on the 4th day of January, 1912, before the HONORABLE CHAS. E. WOLVERTON, District Judge, and a jury, duly impaneled and sworn to try the cause;

Plaintiff appearing by his attorney, Mr. Henry St. Rayner, and defendant appearing by Mr. Robert Treat Platt and Mr. Palmer L. Fales, of its attorneys;

And thereupon, and upon such trial, the following proceedings were had in the cause, the same being all the proceedings had therein, and the same are hereby made a part of the record in this cause, that is to say:

The cause was opened to the jury by the counsel for the respective parties, and thereupon, to sustain the issues on behalf of the plaintiff, the following testimony was introduced:

Portland, Oregon, January 4, 1912.

ALONZO L. MONICAL, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER.)

You are the plaintiff in this case, are you, Mr. Monical?

A. Yes, sir.

Q. How old are you?

A. I was born in December, 1852.

Q. Born in 1852?

A. Yes.

Q. What is your general occupation? When you are able to perform it?

A. Steamboating.

Q. How?

A. Working on steamboats and on the river.

Q. In what particular?

A. Well, sometimes one thing, and sometimes another. Sometimes firing—used to fire oil, when we first got oil in this country; took that the first job firing oil.

Q. Please speak a little louder.

A. I am talking about as loud as I can. I went to firing; fired quite awhile, and worked as watchman—watchman on ship, on the boats.

Q. At the time of the accident, to you, Mr. Monical, on the 25th of March, 1911, what were you engaged in—what work?

A. Watching; watching on the steamer "Shaver."

Q. What wages were you receiving at that time?

A. Equivalent to \$75 a month.

Q. And how long had you been receiving that?

A. Well, I had been about three years for that

company.

Q. When you met with this accident, Mr. Monical, where did you come from?

A. I come from East Davis there; come up East Davis, up Front Street to East Morrison; went down East Morrison to this road-way at Jones' and Supple's.

Q. And what were you going to do when you went into this road-way?

A. I was going there. I got a trunk there—have a trunk there—it is there yet. I have some stuff in it, and I was going to get some truck out of it that I wanted to take away with me.

Q. What was the nature of that?

A. Of what? The stuff I wanted to get out?

Q. The truck you referred to in the trunk.

A. Well, clothing, underwear.

Q. And you were on the way to secure that were you?

A. Yes, sir.

Q. And did you meet with anyone on the road-way? If so, who?

A. Yes, sir. After I turned in on the roadway, and walked down, I suppose I was one-third, maybe, down to where the accident happened, I saw a man comink up the slip.

Q. From the west end?

A. Yes, from the west end, coming up this way toward me, walking, and I walked up close enough. Of course, I knew the man when I got a little closer to him. We walked up and shook hands right there where we were standing.

Q. Who was that man?

A. John Nelson; Captain John Nelson.

Q. Known as Captain Nelson?

A. Yes, sir.

Q. And how long after you met him there was it until the accident happened to you?

A. Well, we couldn't have been standing there not over—couldn't have been more than five minutes.

Q. Now, whereabouts were you standing in relation to the opening on the south side of that road-way that leads into the East Side Boiler Works? Do you know where that opening is?

A. Yes, I have went through it many times. I know all about where the opening is. I have passed out through it.

Q. How far east, I will ask you, of that opening were you standing, about?

A. Well, I could not say. I could not say that, how far. I never thought anything about that part of it. I didn't know anything about it, never looked at it. You see I didn't stop there, only just shook hands with him, and we talked, I suppose, maybe two minutes—I don't know—just a short time.

Q. Now, where were you standing while you were talking?

A. Standing right up close to the railing with our hands upon the railing like this.

Q. Which railing was that?

A. The end rail.

Q. The one on the north side of the road-way?

A. Yes. No, the railing right next off from the

dock, the same as that dock runs this way, right on this railing here. Here come the road, here is the railing. We were standing right over here with our hand on the rail.

COURT: That is on the north side?

A. Yes, north side.

Q. On the north side of the railing as you were going in?

A. Yes, sir.

Q. That would be your right side going up the dock?

A. If I was going back, it would be on my left side. If I was going in, it would be on my right side.

Q. Well, you were going in, weren't you?

A. Yes, sir.

Q. Were you standing in front of any opening in the railing there?

A. No, sir.

Q. Was there a railing there where you were standing?

A. Yes, sir.

Q. How high was it?

A. It come about here.

Q. Up to your chest?

A. Yes. We were standing with our arms on it, like this. He was standing by my right side. I was standing by his left, about two feet apart, likely, just standing with our arms up on the railing like that, standing there, looking down at these boats lying there below us.

Q. Where were these boats lying?

A. Lying on the ways, some of them, and there was a boat in the yard at the same time.

Q. In what yard?

A. Supple's yard.

Q. On the north of this roadway?

A. Yes; yes. And there was some small boats there, gasoline boats, and the "Cash Weir," they called it. We was looking at them. We were standing there talking.

Q. Where was Nelson standing at the time?

A. Standing on the right hand side of me, about two feet from me, I think likely—I don't know.

Q. Was he to the east or west of you?

A. East.

Q. Was he nearer Water Street, or nearer the dock?

A. Nearer Water Street.

Q. Then, he would be east of you a little?

A. Yes.

Q. Now, how were you standing, facing what direction?

A. Facing down the river, south.

Q. Facing down the river? You mean by that, towards the north?

A. Yes. It would be facing the Morrison Street bridge.

Q. Now, did you have your face or your back to the road-way?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. I mean the roadway on which you were standing?

A. Yes. Our back out we were standing there, and the road-way was right here.

Q. Your back?

A. Yes.

Q. And how was Captain Nelson? Was he standing in the same way?

A. He had his arms up on the rail, is all I can say about that. I didn't know how he was standing with his feet, or anything about that. He couldn't have had his feet upon the railing.

Q. Which direction was he looking?

A. He was looking down on those boats. We was talking about those boats.

Q. In Supple's yard?

A. Yes, sir.

Q. Were you both standing there at the time that you were struck, in that way?

A. Yes, sir.

Q. What happened to you while you were standing in that position? Tell the jury just what occurred, as near as you remember.

A. Well, I cannot tell anything about what occurred. I know there was something. I was struck by something, but what it was, I don't know, for I didn't see anything, and I never knowed what it was that hit me for ten or fifteen days after I was in the hospital.

Q. Where did it strike you?

A. Right in here—right in the short ribs.

Q. Did you know what it was that did strike you?

A. No, sir, I didn't know what it was.

Q. Did you receive any warning?

A. No, I heard nothing.

Q. Before you were struck?

A. No, I didn't hear anything before or after. A warning after that wouldn't have been any good.

Q. Did you hear the sounding of any gong?

A. No, sir.

Q. Or a bell?

A. No, sir.

Q. Or whistle?

A. No, sir.

Q. Or anything to give you warning that a truck was going to turn into that East Side Boiler Works opening?

A. No, I did not.

Q. Before you were struck?

A. I did not.

Q. How long have you been in the habit of going on that road-way and passing over it, Mr. Monical?

A. Ever since it was built. I was working for the company at the time it was built. They used that—that was put there for use publicly, and everything to come in there, whatever they wanted in that yard, at the Boiler Works. People would bring in machinery, go in there to be repaired, come in on that road and out. There was always vehicles coming in.

Q. To what extent has that road-way been used by the public?

A. For anything that would come up that it could

be used for—such as cement. He handled cement, you know. Stuff such as that.

Q. Does everybody go there that wanted to?

A. I never saw anybody refused. It was always open. No gateway on it.

Q. I asked you, does everybody go there that wanted to?

A. I never heard tell of anybody being turned away.

Q. It has been used for how many years, to your knowledge, by the public generally, for vehicles and pedestrians?

A. Well, I couldn't say how long. I forget what was there the days before they put this new one in. This new one, I think, has been there about four or five years.

Q. You don't understand my question. How long has it been used by the public generally for vehicles and pedestrians to pass over it, how many years?

Mr. PLATT: I object, if the Court please, to the form of the question. The witness has stated what the dock has been used for—people going to these different business enterprises there.

COURT: He may state how long it has been used in that capacity. You may state to the jury how long it has been used in that capacity.

A. Well, I cannot say just how long.

COURT: Well, about how long, as near as you can tell?

A. Well, it has been used something over four years, I think.

COURT: Do you deny, Mr. Platt, but what that road-way is used by the public, that is, by persons having occasion to go into that mill?

Mr. PLATT: No. But we deny that anybody who was going there except for that purpose, had any other position than that of what is known as implied licensee.

COURT: Proceed, Mr. St. Rayner.

Q. During the four or more years you say you have been in the habit of using that road-way—

A. Yes, sir.

Q. How far is the roadway used? To what extent?

COURT: You mean from Water Street?

Mr. ST. RAYNER: Yes.

Q. From Water Street to the river front, to what extent?

A. Oh, I suppose 200 or 300 feet, something like that—400. I don't know. I never measured it—never thought of it.

Q. The whole distance to the dock, to Supple's dock?

A. Oh, I couldn't tell you. I never thought of such a thing as that, of taking the distance, or anything.

Q. Well, I am not asking you for how many feet, but what portion of the road-way has been used by the public generally that you have testified to—the whole length of it, or only a part of it?

A. The whole length, and onto the Supple's dock.

Q. The whole length from Water Street onto Sup-

ple's dock?

A. Yes, sir.

COURT: Is this road-way in the middle of the block?

Mr. ST. RAYNER: No, Your Honor.

Mr. PLATT: No, your Honor. The map we will introduce in evidence shows that it is all south of the center line of what would be a prolongation——

COURT: Aren't there any streets between Morrison Street and the bridge above it running from Water Street into the river?

Mr. ST. RAYNER: Yes, there is Belmont and Yamhill, your Honor.

COURT: You don't claim that this is either of those open streets?

Mr. ST. RAYNER: Yes, your Honor, it is undoubtedly. It is part of the lower portion of Yamhill Street, your Honor, and this road-way is constructed over the street.

Mr. PLATT: The testimony won't substantiate that.

COURT: Above Yamhill Street?

Mr. ST. RAYNER: Yes, your Honor.

COURT: In the street?

Mr. ST. RAYNER: Why, the roadway is on the south side of the street, your Honor, right over the street on the south side of it.

COURT: You don't so plead that?

Mr. ST. RAYNER: I asked to plead it, your Honor, and counsel objected to it.

COURT: Well, you may go ahead. We will see what the result of this is.

Q. How long were you in the hospital, Mr. Monical?

A. I went into the hospital on the 25th day of March, 1911, and come out on the 9th day of June, 1911.

Q. What injury did you suffer to your left arm? Show the jury your left arm.

A. The trouble commences here, right about here, the first feelings of anything, feels kind of numbness on the side of the head, and here the lower part of my neck, and here, and the head back, and the shoulder. It is all decayed and broke down, goes on down to the fore arm, broke right there.

Q. Your left arm is broken, you say, in the middle portion of the upper bone?

A. Yes, right here. Then it comes on down then to my wrist. This wrist was broke here, these bones here. Then it takes me from my hip, and from here it takes this way, pain, deadness, following all the way up my hip, in my hip joint, and in the small of my back, and of course pains me some below my knee, and my lung on this left side pains me at times. I am so hoarse, so hoarse I cannot hardly talk.

Q. Have you suffered from your left side of your lung to any extent? If so, tell the jury what, Mr. Monical.

A. In my lung?

Q. Yes.

A. Yes. I have suffered from that a great deal

of pain, kind of a dead feeling—pain—and if I go to turn around too much, turn around, I get weak. I can hardly breathe.

Q. Have you been spitting blood to any extent?

A. I have.

Q. How often?

A. Oh, along at the first, it was every day, every hour or so, I would spit blood. And then here of late I don't spit so much blood as I used to, just now and then, once in a while, I will spit blood; maybe once a day, in the morning, maybe I will. I don't particularly notice all the time.

Q. How about breathing on that side?

A. How?

Q. How about your breathing on that side?

A. Well, it hurts me to breathe hard, or anything like that. It hurts me when I draw back this way. I feel better sitting about this way. I don't feel right sitting back.

Q. How is your hearing in your left ear?

A. Well, if a person speaks loud, or talks loud, why, I can hear, and if they talk low, I can't understand. I can hear the roar, but don't understand, if I have my ear away from them. Of course, if I stand with my face right toward them, I am all right, but anything that way, on that side, if they talk to me on that side, they have to talk plain or loud, or I would not hear them—I would not understand. I would hear the noise, but I would not understand what they said.

Q. Is there anything the matter with your teeth as a result of the accident?

A. Oh yes, my teeth fell out—knocked out four of them.

Q. Knocked out four?

A. Yes.

Mr. PLATT: Do you say anything about that in your complaint?

Mr. ST. RAYNER: No, I don't think so.

Mr. PLATT: I move to strike that out.

Mr. ST. RAYNER: Yes, that may go out.

COURT: That will go out.

Mr. ST. RAYNER: I didn't find that out until the other day.

Q. Where were you struck?

A. In the right side, right here, right in the short rib here.

Q. At the back?

A. Yes, right here, where I have my pain.

Q. Have you any pain there now?

A. Yes, at times I do.

Q. How?

A. Yes, I do.

Q. What is the nature of that pain?

A. Well, it is a sickening pain—kind of sick. It makes me feel sick, and I cannot rest or do nothing else. And especially if I turn on my side. If I turn on my side, it feels kind of a burn, kind of a burning pain. Of course, I cannot lay on this side on account of my shoulder.

Q. On your left side?

A. Yes, on the left side, I cannot lay on it at all; and I cannot lay on this one any length of time at all.

I have got to get back on my back if I want to sleep.

Q. Can you lie on either side for any length of time?

A. No, sir, I cannot lie on either side.

Q. Why?

A. Because it pains me so that I cannot, and I cannot go to sleep. If I try to go to sleep, I cannot do it. I have got to get back on my back.

Q. Now, is that a temporary condition, or is it all the time when you try to sleep?

A. Yes, of course. it bothers me, I am in pain all the time, even when I drop off to sleep at times. I will lay all night sometimes, and not sleep at all, through the night, not any. Then, maybe I will go to sleep the next night, and I will sleep so hard the next night that when I do wake up, I cannot move. I begin to work myself in the bed like that to get myself so I can get up, get out of bed. I go out of bed just as I go in always.

Q. You were speaking about a pain around in your back. Which portion of the back is that in?

A. It is in my left side. In this side here, and in my hip here, and right up the small of my back.

Q. Right in the center of the back?

A. Yes, right in the small of my back.

Q. Now, are you able to use your left leg in the ordinary manner that you used to?

A. Oh no, no. I cannot do that. I can drag around. I can walk. I can walk around, by having a cane I can walk, but I could not go out and walk where there is anything that will catch hold of my

feet in any way, because I have no control of myself whatever. If I catch my heel against anything, I am a goner, unless I have a cane. You know if a man has a cane, he naturally throws his weight on the cane, and by that I can drag through, but otherwise I cannot do it, I cannot walk only on the smooth floor. I am afraid.

Q. Are you able to use your left arm or left hand for any practical purpose?

A. No, sir.

Q. Are you able to dress yourself without assistance?

A. No, sir, I cannot do it.

Q. How were you before this accident, physically, and from the standpoint of being healthy constitutionally?

A. I never was sick a day in my life, that I know of. I never lost a day, that I know of, on account of being sick or anything. Always worked.

Q. How much did you weigh at that time?

A. Well, a few days before I was hurt, I weighed 217 pounds.

Q. How much do you weigh since then?

A. I came out of the hospital on the 9th of June, and I was weighed on the 13th—I think it was the 13th of June.

Q. How much did you weigh then?

A. I weighed 177. I think it was 177—something like that.

Q. How much do you weigh now?

A. I don't know. I haven't been weighed right

lately. I haven't been weighed since that. I have gained some, I suppose.

Q. Have you been able to do any work to earn a livelihood since the accident?

A. No, I never earned a penny.

Q. Are you able to do any manual labor, or to earn wages by your labor?

A. No, sir. I am mentally and physically broke down for work, hard work, I could not do it. Of course, if it was anything I could sit and do with that one hand, I might.

Q. With your right hand?

A. Yes.

Q. What has been the nature of your suffering? Has it been confined to physical suffering alone?

A. Oh no, everything. You take a man that never has been tied down for a year, and he has always been up and had enough to go on, and pay his way—of course, some people would not care whether they had anything to pay their way or not; but a man that has always worked, all his life, he would not naturally want somebody to pay his way; and a man naturally would sit down and study, after he gets up out of the hospital, places like that, he would begin to get to study on what was going to become of him.

Q. Well, what I mean, Mr. Monical, is, have you suffered other than physically? Have you suffered mentally?

A. Why, yes, sir. I said that a little bit ago, at the start.

Q. To what extent?

A. Well, no one can tell, as far as that is concerned.

Q. Well, acutely?

A. Yes, sir.

Q. How long have you been suffering that way, Mr. Monical?

A. Well, ever since. Of course, I was suffering all the time I was in the hospital, but then till after a man gets away, as the fellow says, it gets to be an old thing to him, why, he don't notice it so bad. But I suffered all the time from the time I went in the hospital until I come away, and have ever since.

Q. Have ever since?

A. Yes, sir. More so in my left leg. My left leg is worse now than it was the day I came out of the hospital—more pain in it—my left hip.

Q. Who treated you in the hospital, Mr. Monical, first?

A. Dr. Kruger—Gruder—somebody.

Q. Magruder?

A. Magruder.

Q. How long did he treat you?

A. He treated me from the 25th day of March, till about the first day of June. I don't think—yes, he did give me medicine too up to one or two days before I left there.

Q. He was the marine doctor?

A. He was the marine doctor, and I was in the Marine Service, so I was put there.

Q. Do you know anything, Mr. Monical, about the custom of auto trucks to run up and down this

road-way to Supple's dock?

A. Do I know anything about what?

Q. Whether it was customary, before the time that you met with this accident, for auto trucks to run up and down that road-way to Supple's dock?

A. I couldn't tell you that. I never saw one there before; never heard of one being there.

Q. Did you know of any auto trucks being in the habit of running into that Boiler Works?

A. No, sir.

Q. From the opening near where you were standing?

A. No.

Cross-Examination.

Questions by Mr. PLATT:

What was the condition, Mr. Monical, of your hearing at the time of, and prior to this accident?

A. Good.

Q. Did you ever see any of these automobile trucks about the City of Portland here, delivering sand and gravel and other heavy loads?

A. I have.

Q. You know what they are when you see them?

A. Yes, sir, here of late. Lately it has been getting very popular, automobiles; do all their sand hauling and gravel with auto trucks.

Q. Haul a great deal of their heavy material around town by that method?

A. Yes.

Q. Now, you say this elevated road-way where

this accident took place is used to get into Supple's dock and also into the East Side Boiler Works? That is correct, is it not?

A. Yes, sir.

Q. There isn't any sidewalk there for foot passengers, is there?

A. No, not that I know of. I don't know whether they aim to put a sidewalk or not. It is a road, about 20 feet of roadway.

Q. About 20 feet wide, isn't it?

A. Yes, half belongs—it is a partnership road between Supple and Jones. They built it that way. Each fellow furnished his material, and they drove the piling, and they put their material down there. Each one put in ten feet, I think it was.

Q. You knew all about it when it was built?

A. Yes, sir, I did.

Q. Now, I say there is no separate sidewalk there for foot passengers, is there?

A. I haven't saw it for a year, I don't know what is there now.

Q. There was not when this accident took place?

A. There was not at that time. We walked right on the road.

Q. Now, these four red docks, or red warehouses, down at the end there, belong to Supple, don't they?

A. They do.

Q. Those are what you spoke of as the cement docks?

A. Yes.

Q. You mean by that that they are used for the

storage of cement in bulk, sacks?

A. Sacks, I guess.

Q. Now, how do they get that cement out of that?

A. Over this road-way.

Q. It is taken out by teams, is it?

A. Yes, sir.

Q. And by automobile trucks?

A. I don't know. I never saw one.

Q. Anyway, it is taken out in some form of four-wheeled vehicle?

A. Yes.

Q. Now, the East Side Boiler Works is on the south side of the road-way, isn't it, towards the Madison Street bridge?

A. Yes, the Boiler Works is.

Q. That is, on the south?

A. Yes, that is the Boiler Works on that side.

Q. That is the left hand side going out, on the right hand side coming in?

A. It is on the left hand side going in, coming this way, come this way, and the dock is on that side.

Q. Yes, that is the south side.

A. Yes, south side, of course. I am turned around.

Q. Now, how did the heavy material that goes into a boiler works, like boiler plate and heavy iron, how did that get in there?

A. I suppose it is hauled in by wagons or drays, or something—I don't know what.

Q. Now, how long prior to the time that you were hurt at this place of accident was it that you had been there before? When were you there before that?

A. Oh, I suppose it was three months, I reckon.

Q. You were working at that time for the Shaver Transportation Company, were you not?

A. Yes, sir.

Q. And they tie up on the west side of the river, don't they?

A. They tied up at Davis Street.

Q. The foot of Davis Street?

A. Yes.

Q. The foot of East Davis Street or West Davis?

E. East Davis Street, I guess it is.

COURT: It is on the west side of the river, isn't it?

A. Yes.

Mr. PLATT: I didn't catch what he said.

JUROR: He said west side.

Q. You had been working for them about three years?

A. Shaver?

Q. Yes.

A. Yes, sir.

Q. Where were you living at that time?

A. When I was working there?

Q. Yes.

A. On the boat.

Q. Well, when the boat was out, down the river, were you on her?

A. I guess I was.

Q. You lived on the boat, in other words, did you not, all the time?

A. Yes, I was watchman on the boat, and watched

her nights, day time too.

Q. That was when she was tied up?

A. When she was tied up or running.

Q. Did you live with either of your sons? I mean, did you keep your home with either of your sons at that time?

A. Oh, I had things, some goods, one thing and another, I would keep at their place.

Q. Which one of your sons?

A. W. C. Monical.

Q. That was down on what street?

A. East 24th North.

Q. That is what you call your home?

A. Yes.

Q. Now, you quit working for the Jones people—the Willamette and Columbia River Towing Company, I believe, is their legal title—about three years prior, when you went to work for the Shaver people—is that correct?

A. I had been working for them three years, do you mean?

Q. No, you had worked for the Shaver people about three years, and immediately prior to that you worked for the Jones people, didn't you?

A. I worked for Shaver's, and I worked for Jones, and I worked for Shavers once before I worked for Jones, but then that wasn't this time.

Q. What I want to get at is, whom were you working for immediately prior to the time you went to work for Shaver's three years before this accident?

A. Who was I working for before then?

Q. Yes.

A. I was working for Jones.

Q. How long did you work for Jones that time?

A. Something over two years.

Q. Over how long?

A. I had worked something over two years for Jones. I guess the books will show, if you want to find out.

Q. Yes. Well now, how many times had you had occasion to go over to this property and over this road-way during the time, this three years that you had worked for the Shaver people, after you left Jones' employ?

A. Oh, I don't know. I had been over there several times, I suppose maybe half a dozen times, in the time. I would go over there and go to the office to see if there was any mail.

Q. To the office?

A. Yes.

Q. Well, the office is on East Water Street, isn't it?

A. Which?

Q. The office of the Jones people is on East Water Street?

A. Yes.

Q. You would not have to go onto this road-way at all to go to the office?

A. No, not then.

Q. You would not have to go onto the road-way at all to get to the Jones office, would you?

A. No, not if you wanted to go to the office; but if

you wanted to go to the warehouse, you had to go the other way.

Q. Well now, where is the warehouse?

A. It is right on the left hand side of the road that you come in onto the dock on, on the left hand side coming in, there is the warehouse. They had a warehouse they kept their goods in, provisions and stuff that were for the boats, and everything; they had it locked up in there.

Q. Where was this warehouse with reference to the passage way leading into the East Side Boiler Works?

A. Well, the warehouse come first back of the office, then come a long—well, enough stable room to stable twelve head of horses. Then come the machine work, machine shop. The boiler works is not there. It is on the corner.

Q. The Boiler Works is further south?

A. Yes, on the corner.

Q. You go through?

A. Yes, this way, makes that turn.

Q. Now, this warehouse, as I understand you, is immediately back of the office there near East Water Street?

A. Yes, pretty close. I don't know as you can call it—they called it a store room. They kept all their provisions and such as that for the boats.

Q. How do you get into that—through the office?

A. Through the office, or there is a side door, either one.

Q. Where is the side door, on which side?

A. On the outside of the building, on the inside.

Q. On Jones' side or on Supple's side?

A. Yes, on Jones' side.

Q. The other side of this warehouse, and the south side?

A. Yes.

Q. And your trunk was kept in that warehouse?

A. Yes.

Q. Well now, if this warehouse was immediately back of this office, and the entrance to the warehouse was over on the south side of it, what occasion was there to go onto this elevated road-way to get into that warehouse?

A. Because you cannot go into the warehouse now, or ain't for a year or better in the front. You have got to come down there to go in, to get into this warehouse to a door from the shop; open the door for us, open the door and we go right in there, to the best of my knowledge.

Q. Isn't it a fact that the main passage way from Water Street to the Jones' part of this joint property, and to where Jones fastens up his boats, and where you get into Jones' warehouse, is over south of these buildings?

A. From the office?

Q. Yes.

A. Well, yes, come from the office.

Q. From Water Street too?

A. Yes, it is on Water Street, the office is.

Q. So that there is no occasion to go onto this

road-way to get into that warehouse?

A. No.

Q. Isn't that a fact?

A. Oh, that is all right. Just wait till I tell you a little more, will you?

Q. Well, that is what I want to get at now.

A. When I went there, there was nobody in the office. There is a gateway, you know, across that front there. There is a gateway across the front of this entrance you claim goes down inside there. Here is the office, and there is the gateway, and comes over to the building over here. That fastens that up there. That is fastened up. If there is nobody around there, you cannot go in there. You can go down there. This entrance to the machine shop, you can walk right around there, and come up to the entrance to the dock; and if you want to go into the warehouse, you can unlock it if you have got a key. You always can get a key from some of the men there.

Q. Was there any reason why you couldn't open the gate?

A. What?

Q. Any reason why you couldn't open the gate on the south side?

A. Well, they never used it. They never used it for any one to travel. I have heard them say they didn't want any one to open that gate and travel in there ;the road was on the outside.

Q. But you went on this occasion down this elevated roadway?

A. I went down the public road-way—supposed

to be public there. There is no signs to show that it was not.

Q. Now, when did you leave this trunk there, Mr. Monical?

A. About three years or four, when I left. About two years or two and a half years before I went to work for Shaver, I worked for them, and worked nearly three years for them. And when I left there, I left the trunk there. What day I left it there I could not tell you, but I left it there, and went to work for Shaver. And I was to that trunk twice in that time to get parcels out that I wanted out. I had no place to keep them. Anything I wanted I would put it in there, and go and get it when I wanted it. I asked Mr. Jones about leaving the trunk, and he said it was all right—it was not in his way—if I wanted to leave it there, why leave it.

Q. Did you pay anything for the privilege of leaving it there?

A. Did I? I would pay anything if he wanted it, if he asked it.

Q. You never have?

A. No, never have.

Q. He didn't ask it?

A. Leave it in the warehouse, that is all. Lots of others in there. Fellows go off and leave their trunks there, and never get them. They just lay there.

Q. As I understand, Mr. Monical, when you got in on this road-way, about opposite the entrance of this East Side Boiler Works, you saw Captain John Nelson coming up from the slip, or from the cement dock?

A. No, I didn't say that. I was coming down this walk-way, as I told you, or this road-way, was maybe half way down, maybe not over one-third, and ahead of me I saw Captain Nelson coming out from this boat, from the slip, and the boat was landed at the slip; and come up and onto the dock and walk toward me; and we met something near about this entrance to this Boiler Works you are talking about. It must have been something near to it. Maybe a little past it,—well, it must have been about the entrance, I suppose,—I don't know.

Q. And you shook hands, and then proceeded to lean up on the railing on the north side to talk about these boats that were down in here on Supple's ways: Is that correct?

A. Yes. When we met, we shook hands. Maybe we didn't put our hands up there for a half minute or so; but a few minutes we entered into conversation about a boat there. I was there to see that boat there that day myself, for that purpose, to take a look at it, and it was sitting there, and I asked him some questions about it. That is all. We stood there to talk—that is all I know.

Q. You said you went over there to see that boat that day?

A. I was going to look at that boat while I was there; did do it.

Q. What boat was that?

A. The "Cash Weir."

Q. She lay over there on Supple's ways?

A. She didn't lay on the ways at all. She lay just above the ways, just below the ways, at the water's edge.

Q. You were leaning up with one elbow on the railing, as I understand you, and Captain Nelson was leaning also, and you were talking about this boat?

A. Yes, there was something said about the boat.

Q. Do you remember a pile of planking, three by twelve planking, that was piled up alongside of this road-way there, about the point of the accident?

A. No, I don't.

Q. I will hand you a photograph, and see if it will refresh your recollection at all.

A. I don't think it will.

Q. I call your attention on this photograph to a pile of planking, 3x12 planking, nearly as high as the railing, and ask you if you remember seeing that, or recall it?

A. No, I couldn't say.

Q. And how about these other planking, 2 thick, lying farther east? Do you remember those?

A. No.

Q. Now, do you remember there being a piece of railing gone here between the point where you see them joined?

A. I didn't see any up that far.

Q. And you are positive now, Mr. Monical, that where you were leaning, the railing was not gone?

A. Oh no, the railing was there.

Q. Now, your hearing at that time, as I understood you, was in first class condition?

A. Yes.

Q. And a pair of horses and a dray, loaded or unloaded, coming over that plank roadway, could have made some noise, would it not?

A. I suppose so.

Q. And if there had been one coming towards you from Water Street, wouldn't you have been liable to have heard it?

A. I don't know, I might. Yes, I guess I would, if it made enough noise.

Q. And do I understand that you want this jury to understand you as saying that this automobile truck came all the way from Water Street down to where you were standing, and that you didn't hear it at all?

A. I did not hear it. If I had, certainly I would have got out of the way of it.

Q. Now, as I understand you, Mr. Monical, Dr. Magruder attended you as Marine Hospital surgeon, from the time of this accident up till about the time you left the hospital the 9th of June?

A. I was under his charge.

Q. Yes. And have you had any medical attention since?

A. He examined me himself once since.

Q. But with that exception?

A. Yes, sir, I have been examined by two medical doctors.

Q. Well, have you been under treatment, or simply had an examination?

A. No, examination is all.

Q. Now, as I understand you, with reference to your sleeping, Mr. Monical, sometimes you sleep so hard that your back aches in the morning?

A. I didn't say my back ached, I don't think. I don't ache all over—sleep till you are dead—just sleep till you feel like you are dead all over; can't move.

Q. Did you ever sleep that hard before you were hurt, Captain?

A. Well, I don't think so.

Q. I am just interested, because I have, and I wondered if you ever had.

A. I expect you have, but I don't know whether I ever did or not. I might, but I don't think so. Maybe I notice it more now.

Q. Now, this hearing in your left ear, as I understand you, I noticed this morning in the courtroom that a pretty young woman was sitting alongside of you, and she whispered to you, and you answered her, sitting on your left side. You heard what she said, I suppose?

A. Yes.

Q. So that that hearing in that left ear is not very bad, is it, Captain?

A. It ain't very bad. I never said it was. I said that I could not understand with that ear hearing, if I had my head this way to you, I wouldn't never hear—this way from you, and you were sitting back here, my head turned this way, I would not hear you without you spoke louder than you would if I was this way. This ear (right) I could hear it better.

Q. Now, the stiffness of the arm that was broken,

and of the wrist that was broken, I suppose have been steadily improving, hasn't it, since you have been out of the hospital?

A. No, sir, it has not, I don't think. I can't see why.

Q. Well, wasn't it set properly?

A. The doctor set it.

Q. Your examination since has not demonstrated it was not set properly, has it?

A. They had nothing to do with that. They hadn't anything to do with that part of it; how he set it. They weren't examining what he had done.

Q. You knew, did you not, Mr. Monical, that this road-way was about 20 feet above the ground there at this point?

A. I done what?

Q. You knew that this road-way was up about 20 feet from the ground, did you not?

A. I didn't know how high it was, I am sure. I had never measured it. I didn't know anything about the height. I knew it was up.

Q. Well, you knew it was some distance up, didn't you?

A. Yes, I knew it was some distance up.

Q. And you knew there was some piling and some of Supple's material laying down there on the level, did you not?

A. You mean, on the dock?

Q. Underneath?

A. No, I didn't see that. I never saw anything laying there.

Q. Well, you knew there was more or less material around there, underneath that dock, didn't you, underneath that road-way?

A. Rubbish?

Q. Yes.

A. Old logs?

Q. Yes.

A. You could see that in piles.

Q. Now, was Captain Nelson struck, do you know, at the time you were?

A. He says he was.

Q. Well, I mean, did he say so before you were struck or since?

A. As I come out of the hospital, he told me.

Q. Yes, but did you know at the time that he was struck?

A. That same time that I was?

Q. Yes.

A. Why no, I didn't know anything. I told you in the start I didn't know anything.

Q. He was east of you, wasn't he?

A. I don't remember nothing, only something took hold of me, and that is the last I remember for about 13 or 14 days.

Q. Well, where was Nelson when you were struck?

A. Before I was struck, he was standing on that side of me, but where he was when I was struck, I could not tell you that.

Q. Had he disappeared?

A. I don't know whether he had or not. I dis-

appeared, I suppose.

Q. Did he say anything to you?

A. I heard nothing.

Q. He didn't give you any warning, or make any outcry?

A. I don't know that he had any himself. I don't know anything about it, for it was just like lightning, hit you just like that, took you that quick. I didn't know anything no more. Part of the time I would know something for a minute or two.

JUROR: May I ask the witness a question?

COURT: Yes.

Examination by Juror.

Q. I understood you to say this railing was up breast high that you were leaning on.

A. It come just about like that.

Q. And the iron struck you on the right side down here?

A. The iron struck me right in here.

Q. Well then, in order to throw you over there, it must have either broken that railing over or else lifted you off your feet, one or the other?

A. I guess I must have went right up on the rail; the iron must have took me right up that way.

Q. It must have either lifted you off your feet, or else broken the rail over?

A. Yes, well, I went down through. I was gone.

Redirect Examination.

Q. You spoke about people going into the office of Jones down by Water Street, and you said that there is a gate there that was closed when you went

there that day, and you had been told by Jones that he didn't want anybody going through there. Now, which way was it that the public was in the habit of going in order to go onto those premises?

A. Took the road-way on the outside.

Q. To go in where?

A. Into the boiler shop, or any place on the lower docks.

Q. To go through that opening?

A. Yes.

Q. Near where you were at this time?

A. There is an opening there, and just a little ways further there was another opening there when this would be closed. Sometimes this opening here was closed. There is a small opening here, an entrance just about like a door, common door, walk by and go in at it going across to work or around the boats.

(Witness excused.)

CAPTAIN JOHN E. NELSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr ST. RAYNER:

Where do you reside, Mr. Nelson?

A. Lower Albina.

Q. How long have you resided in Portland?

A. About 30 years.

Q. What is your occupation?

A. Master and pilot of river steamers.

Q. What were you engaged in doing on the 25th

of last March?

A. Well, at that time I had gone over to see about going pilot on a tug boat laying there at Supple's dock. I had just left the railroad bridge company's boats, and went over there to go to work.

Q. Went over there for what purpose?

A. I went over there to see about going pilot on the tug boat that was laying there.

Q. And after attending to that, what did you do?

Q. Well, I started off from the dock up the slip, and just as I got on the road-way, there, I met Mr. Monical, and we stopped and shook hands, and leaned up on the railing. There is a railing runs along on the north side of the road-way.

Q. Which road-way do you refer to?

A. From Water Street out to Supple dock.

Q. Where Mr. Monical met this injury?

A. Yes, right at that point.

Q. Now, tell the jury what happened there, what you did, and what Mr. Monical did, and about the accident.

A. Well, we hadn't met for quite awhile, and naturally friends, we stopped and shook hands and talked. We were talking about steam boats, and different things, and Mr. Monical spoke to me about he thought he would try and rent the "Cash Weir." Also he had gone down to see about his trunk. And we hadn't been standing there but a very few moments, leaning with our arms on the rail. There was a piece along the railing there that the upright piece is fastened to, and I was standing on that, just leaning over,

with my arms on the railing, and this truck came along and struck us. Not noticing anything about the truck—they had been running out and in there all the time, carrying cement back and forth there every few minutes, hauling cement; and when they came through there, they always keep away about from three to three and a half foot from the rail; they never tried to get any closer to the rail than that. And of course when this truck come along, we was not noticing it, and they went to make the swing; his angle iron swung around and struck me in the side here, and knocked me down. And as it did, I hallooed to Mr. Monical to get down. But he couldn't get away—it got him, and turned him on the turn. Well, there was about $3\frac{1}{2}$ feet from the end of the broken rail; that is, Mr. Monical was. I was standing to his right on the east side of him, and I jumped and grabbed him. He was then plunging right ahead, head first, like that, when I grabbed him by the coat. It turned him, and he fell right across four logs that lay in that position: two high logs on the outside, and the small logs on the center. That is the way he lay when we picked him up, his head to the east.

Q. Where were these logs?

A. Down on the ground, down below the dock, below the road-way.

Q. What distance is it from the road-way down to those logs, about, Captain?

A. Well, I measured there. It was $18\frac{1}{2}$ foot to the highest log, that is, the east log.

Q. And how much the others?

A. Well, they had a tendency to slope a little bit.

Q. That is, from the planking of the road-way?

A. Yes, sir, from the planking road-way.

Q. Off from the road-way?

A. Off from the planking.

Q. And how far east of what you have stated would be the broken rail was Mr. Monical standing, you say?

A. About three or three and a half foot, perhaps four foot, somewheres in that neighborhood. It just made one turn, turned him one time, and slid him along; and then he was pitching head first, and I grabbed him, and it passed over.

Q. What was it turned him and pitched him?

A. These angle irons on the automobile truck.

Q. How far were they protruding from the back of the truck?

A. Well, I didn't measure them, but I presume they was something in the neighborhood of about 12 feet to 14 feet.

Q. Sticking out 12 or 14 feet behind the back of the truck?

A. Yes, sir, over the end of the bed of the automobile.

Q. And that is what struck him?

A. Yes, sir.

Q. Now, prior to the time that Mr. Monical and you were struck by that angle iron, did the chauffeur who was operating it give you any warning of any kind?

A. No warning whatever.

Q. Did he sound a gong?

A. No, sir.

Q. A bell?

A. No, sir.

Q. Halloo to you or anything?

A. Not a thing.

Q. Or give you any indication that he was going to turn into that opening to the boiler works?

A. No, sir, not a thing.

Q. Is it the habit, that you know of, of autos to turn into that boiler works?

A. I don't think I ever saw one turn in there before.

Q. How often had you been on that roadway?

A. Very frequently. Most every day that I was running along looking out for the boats. At that time I was thinking about going to work for the C. C. Company, and I was over there every day. Sometimes their boats would be laying at the Supple docks. Sometimes they would be laying up to their dock, up to East Main Street. But I see the trucks going out and in the cement dock all the time.

Q. How long had you been going over that roadway? For what number of years?

A. Well, not many years.

Q. About how many?

A. This last time when I was running the railroad boat, I quit about two weeks or three weeks, I think, before this happened, and then I was partly engaged to go pilot on the tug "Triumph." The captain told me to come over frequently, it was liable to

turn up most any time, the position.

Q. Did you notice the pile of lumber piled on the road-way to the west of where you were standing?

A. Yes, sir.

Q. How far west of you and Mr. Monical was that?

A. Well, if I recollect right, there was a space between the broken rail and the end of that lumber somewheres in the neighborhood of about five or six feet.

Q. How high was the lumber piled?

A. Up to the railing.

Q. And what kind of lumber was it?

A. It was heavy. I think it was heavy flooring; that is, deck for the dock.

Q. How large was it? Do you know the dimensions?

A. Well, it must have been 4x12, or something like that. I don't know exactly. It was heavy.

Q. And one was piled on top of the other up to the railing?

A. Yes, sir, fore and aft along the railing.

Q. Did you notice whether or not this angle iron on this auto truck ran into that pile of lumber at all?

A. It struck the lumber pile.

Q. It struck the lumber pile?

A. Yes, and turned one plank out, it hung out over the railing.

Q. And how close to the railing was that lumber piled?

A. Right up; right up close against it.

Q. Right up to the railing?

A. Yes, sir.

Q. And in what way did it strike and knock out one of those planks?

A. Well, as this angle iron came around something this way, it struck that that way; it kind of threw it out some way as it hung out over the dock.

Q. How much of it hung out?

A. Well, I couldn't say exactly. I was in a hurry to get down to see Mr. Monical, to pick him up. I ran around, and picked him up.

Q. Do you know whether the angle iron protruded over the railing or not?

A. No. It went right on in so quick I didn't notice that, sir.

Q. Now what became of the auto truck? Did it run through the opening?

A. No, it hung up on the west side of the entrance. The hub, I think, struck the corner of the house there. It stopped.

Q. Which corner?

A. On the west side of the entrance.

Q. Did you have any conversation or say anything to the chauffeur who was operating it?

A. I did.

Q. What was that?

A. I called his attention. I says, "See what you've done." And he didn't answer me. So I ran around where Mr. Monical lay, and I had hallooed, of course, in the meantime, and the workmen in the shipyard,

they came running, so we picked him up and carried him over and laid him on the ground, and they got a tarpaulin, and we laid him on the tarpaulin, and also then telephoned for a doctor, and Captain Jim Shaver.

Q. Now, what was his condition when you picked him up, Captain?

A. Well, he was helpless. He didn't know anything.

Q. He was insensible?

A. He was unconscious, yes, sir.

Q. In what condition was he lying when you first picked him up?

A. He was lying with his head to the east, on his left side.

Q. Did you notice as to the condition of his face?

A. Yes, sir.

Q. What was that?

A. Well, it seemed like the blood all rushed to his face, and his lips commenced to swell, and his jaw seemed to be set, and I took my knife and pried open his mouth, and got it between his teeth.

Q. How many persons were there there that came to your assistance?

A. Oh, there was quite a few. I couldn't say exactly—several.

Q. Did the chauffeur, after you called his attention to what he had done, do anything towards assisting?

A. No.

Q. What did he do?

A. Next time I saw him, he was laying with his

arms on the lumber pile, like that, and he was raving; he was hallooing and almost crying, trying to cry. He was very much excited after witnessing what he had done.

Q. How long had you known Mr. Monical, Captain?

A. Well, somewhere in the neighborhood of—oh, it is 20 years, I presume.

Q. Now, what was his physical condition at the time previous to this injury?

A. A good strong, healthy man.

Q. Did you ever know of him having anything the matter with him physically?

A. No, sir.

Q. What time in the day was it that this accident occurred?

A. Well, it was somewheres between 11:30 and 12 o'clock.

Q. What has been the custom in regard to the use of that dock prior to that time by the public generally, and the road-way?

A. Everybody go out on the dock that wish to.

Q. Over this road-way?

A. Yes, sir.

Q. Open for everybody?

A. Yes, sir.

Q. Passengers to the boats and back again?

A. Oh, yes. The "Bay Ocean" laid there at the north end of the dock, took on the passengers for Bay Ocean View.

Mr. PLATT: Prior to this accident?

A. And when she came in here, she would land her passengers there.

Mr. PLATT: Prior to this accident?

A. Yes. No, afterwards. Just the same condition today as it was then.

Mr. PLATT: I move to strike that out.

COURT: I think it may go out.

Q. What occurred before, I mean, Captain? Never mind about what occurred after.

A. What, in regards to the boats landing there, and so on?

Q. Yes.

A. I have landed there on several occasions.

Q. And passengers—pedestrians?

A. Well, I had no passengers.

Q. I don't mean your passengers, but foot passengers going up the road-way?

A. Oh, it is a common thing to see people walking back and forth there.

Q. The public generally go there who want to?

A. Yes, sir.

Q. How long has that been going on to your knowledge?

A. Well, most any day you go over there you can see somebody walking back and forth. Perhaps they are going down to the boats. There was for quite awhile that the Columbia Contracting Company had two or three boats laying there. Well, there is quite a crew on those three boats. They would be going back and forth all the time.

Q. Just the same as in any other road or street in

the city?

A. Yes, just the same; no difference at all whatever.

Cross-Examination.

Questions by Mr. PLATT:

You say just the same as any other road-way in the city?

A. Yes, sir, as far as traffic is concerned.

Q. The same as Morrison Street out here?

A. Every bit. Anybody who wanted to go down there, go down. There was nobody ever stopped you.

Q. They didn't go anywhere, did they, except to Supple's dock?

A. Oh, yes, they could. They could go in onto the Willamette and Columbia Towing Company's dock, or on the boats.

Q. There is no occasion for anybody to go there unless they have business there, at Supple's dock or Jones' dock, or the East Side Boiler Works, was there?

A. I don't see why.

Q. It don't go anywhere, does it? It goes to the water?

A. You can go out there, and get sights of the river front. Lots of times a man will take a walk out on the dock that has no particular business.

Q. You didn't mean to say that led anywhere else?

A. Yes, it leads places. It leads out to the boats that are laying there. Somebody might want to go out and look at the boats.

Q. When you say they go the same as they do on

any other street in the city—

A. They do, the same as any other docks.

Q. You are talking about docks, now?

A. This was a wharf.

Q. Was it like a street?

A. Just the same as going down on any other dock.

Q. Just like a dock, not like a street, is it?

A. It was a half a street, isn't it?

Q. Well, is it a street or a dock?

A. Well, on that road-way—

Q. Yes.

A. I should think you would call it a street—half a street—the road-way. It is the entrance to the dock.

Q. If you keep walking you would get into the water, wouldn't you?

A. No, sir, not unless you fell off the dock. You would do that if you fell off the bridge.

Q. You know it is a dock, and not a street. Be fair about it.

A. I know what is a dock?

Q. That structure.

A. I know there is a road to go out to the docks.

Q. A roadway to go onto the docks?

A. Either the Willamette Towing Company dock, or the Supple dock.

Q. Now is there anything the matter with your hearing.

A. Not a bit.

Q. And if there is a big automobile truck running

down there on that elevated plankway, couldn't you hear it?

A. You bet I could.

Q. And you didn't hear this one?

A. I didn't say so.

Q. Did you hear it?

A. I heard every one that come on there.

Q. Did you hear this one?

A. I presume I did.

Q. Did you pay any attention to it?

A. No, because I was so used to seeing them come along there.

Q. You took your chances, in other words.

A. I took no chance at all. If I would turn around every time I hear an automobile truck, I would be breaking my neck.

Q. Now, this pile of plank alongside of this railing was how far west of where you and Mr. Monical were standing?

A. It couldn't have been over six feet.

Q. Where was the break in it where the rail was gone?

A. The break was between the lumber pile and where Mr. Monical and I stood.

Q. Well now were there some loose planks near where you were standing?

A. Loose plank what, in the road-way toward the ship, or how do you mean?

Q. Lying alongside of this railing?

A. There was an upright piece there.

Q. Yes, I understand that, but you have spoken about this pile of planking.

A. That was west of where we stood.

Q. Well, was there any planking piled alongside of the roadway on the north side there, near where you were standing?

A. West of us there was a pile of lumber piled.

Q. Was there any where you were?

A. The only piece was this piece that comes up here at the edge of the dock, where this railing is fastened to, there is that piece, there is about eight inches, I presume.

Q. I understand, but that is fastened; that is nailed on.

A. Yes.

Q. But what I am asking you was whether there were any loose pieces of the same character as this pile lying alongside of this coping, or whatever you choose to call it, that these uprights to this railing were fastened onto?

A. Where I was standing, no, sir.

Q. You say that you were standing on what?

A. I was standing on his right, to the east of him.

Q. Yes, but I understood you to say that you were standing on this coping, with your elbows, one or more of them, on the railing?

A. That is what I said.

Q. And you say that these angle irons hit you where?

A. I was leaning right over like that, and they caught me just along here.

Q. Hit you just below the shoulder?

A. Right along there, yes.

Q. Well, that must have been up above the rail,

then, mustn't it?

A. I was leaning just like that. It came right along and struck me right in here.

Q. And you say it knocked you down?

A. Yes, sir.

Q. Whereabouts did you land?

A. I landed on the deck.

Q. Right down alongside of this coping?

A. Yes, sir.

Q. And what position did your body assume when you struck? Were you flat?

A. As it struck me, I partly dropped, and I dropped on my knees and my hands.

Q. Facing which way?

A. Facing Mr. Monical to the west.

Q. And then you say they struck him?

A. Turned him around completely, and I got over to him, and grabbed him by the coat just as he was going head first right through the opening.

Q. Was he standing up on that coping too?

A. Him? I couldn't say, I am sure.

Q. Did you have both feet on it, or only one?

A. One.

Q. In other words, you had one foot on the main plank roadway, and one up on this coping?

A. Well, not necessarily, no. A fellow generally stands sometimes with one foot just hanging below, or may change feet.

Q. And you say this whirled him around down flat on this roadway?

A. No, I didn't.

Q. Well, what is the fact?

A. I say it rolled him right along the railing, right the same as there is the railing, it turned him completely around like that, till he came to this opening.

Q. Was there an opening in the coping?

A. In the railing.

Q. What do you mean by the railing?

A. It runs out.

Q. This 4x4 that was up here about?

A. Yes, that is the railing?

Q. Wasn't there a coping from the road-way up about—

A. Eight inches, I presume.

Q. Well, whatever it was.

A. Yes.

Q. And wasn't that high enough to impede the progress of his rolling off?

A. I don't know anything about that; don't know whether he was standing on it or not. I couldn't say that.

Q. Now, you say you have seen automobile trucks running down there to the cement dock frequently?

A. Right along all the time, back and forth.

Q. Every few minutes?

A. Yes, sir; don't pay any attention to them at all.

Q. What is your occupation now?

A. Master and pilot.

Q. Whom are you working for now?

A. Nobody at the present.

Q. Now, you are aware of this entrance to this Boiler Works, are you not? You were at that time?

A. Yes, I have gone through there quite often.

Q. And you have seen vehicles going in and out of that?

A. Nothing in there, I never did. That is the only one ever I saw turn in there.

Q. Well, they are supposed to get material there from somewhere?

A. I suppose likely they do. I don't know anything about that, how they get it in.

Q. It wouldn't be taken in by hand?

A. That is the only one I ever saw turn in there.

Q. Yet you have been there a good deal?

A. Yes, sir.

Q. Isn't it a fact you knew this automobile truck was coming, and you just took a chance there?

A. Didn't take any chance at all, because the automobile trucks was going in and out on the dock there, hauling cement.

Q. Well, there wasn't any place there for foot passengers, was there, any sidewalk?

A. The road-way is built right up against the building; it takes in the full part of that half of the street.

Q. There is no sidewalk there?

A. There is no raised sidewalk, no. It is all on a level; full road-way or half road-way.

Q. Now, Mr. Monical said he didn't see any opening in this rail, but you saw it?

A. You bet I saw it.

Q. Do you know how long that opening was?

A. About six feet between the opening and the

pile of lumber, something like that. I couldn't say exactly. The lumber was piled right along the railings, and part of it was lapped up onto the other part of the broken rail.

Q. As a matter of fact, there were several piles along there, weren't there?

A. Oh no, not along the rail there wasn't no. I only noticed that one pile.

Q. You only noticed one?

A. That is all.

Q. You wouldn't swear there weren't several, though?

A. I wouldn't swear there wasn't, or wouldn't swear there was.

Examination by Juror.

Q. How high is this railing above the deck?

A. That is standing right on the planking?

Q. Yes.

A. Well, I should judge it would come along in here to me some place.

Q. About four feet?

A. I didn't notice it particularly. I was just standing there with my hands like that.

Q. You say this angle iron struck you on the right side?

A. Yes.

Q. And threw you down?

A. Partly threw me, and as it struck me, I dropped.

Q. And at the same time it struck Mr. Monical and rolled him down?

A. Yes.

Q. And you caught him?

A. Yes.

Q. Did it sweep you along with him? Or what position were you in when it caught him?

A. I commenced to rise as soon as it passed me.

Q. But it struck this planking, and shoved one of them partly out?

A. That was after it struck.

Q. Wouldn't those rails be directly over you and Mr. Monical?

A. It had him against the rail, and rolled him, but after it passed over me, I jumped up and hallooed to him to look out, but he couldn't get down, so I saw the opening, and he was pitching forward just like that when I made a grab, and I grabbed him by the coat and held on all I could.

Q. Before you really went down yourself, then?

A. No; no after I gained my feet. I jumped up. It didn't hurt me practically, to speak of.

Q. Then he didn't go through that hole in the railing until after the irons had left you people?

A. It dragged him along, and just as he got to this opening, the same as that it had him on, he was overbalanced, and then the truck had started to go most straight into the dock, and he was overbalanced in this shape that he couldn't catch himself, and I made a grab, and caught him by the coat.

Q. And the irons were still pushing against him when you caught him?

A. No, they had left him then. They had got him

started overbalanced.

Q. They didn't really force him through, but he overbalanced and fell through?

A. It took him along the railing. Just as he got to the end of the railing here, it was pressing him hard against the railing, when he got to the opening he had nothing to support him, so naturally he started to fall forward, right onto his face.

Recross-Examination.

Q. You saw no break in the copings there, was there?

A. What do you mean by the coping?

Q. This 4x12 that was nailed along the edge.

A. It was all taken out, everything was clean right to the planking. There wasn't anything left, not where the break was.

Q. You are satisfied of that?

A. Yes, sir, I am.

Redirect Examination.

Q. But as I understand, both you and Mr. Monical were standing east of where this rail was out?

A. To the east of the break in the rail, yes, sir.

Q. In other words, neither you nor Mr. Monical was standing in front of the break?

A. No, sir.

Q. And it was the iron that struck him and knocked him through this opening?

A. That is the cause of him going off the dock.

Q. By knocking and pushing?

A. Yes, sir.

Q. Now, how far, Mr. Nelson, was it, as near as

you can recollect—say this is the river up here, we will say, and the Supple dock, and this is Water Street here.

A. Yes, sir.

Q. And this is the opening to the East Side Boiler Works?

A. Yes, sir.

Q. Now, how far to the east of that east side of the opening to the Boiler Works on this side were you and Mr. Monical standing?

A. Let me see. I should judge it is somewheres in the neighborhood of maybe 19 or 20 feet; maybe a little more. I couldn't say for sure.

Q. Why did you not pay any attention to this auto truck, to these auto trucks that were running past there?

A. Well, it is just a common occurrence for a truck to be going along there back and forth on the dock all the time, hauling cement. Besides when they come there they never run up close to that railing, as I said before, they always leave room on the railing, plenty of room for anybody to walk there.

Q. When you were struck, how far was your body from the railing when you were struck?

A. I was leaning with my arms right on the railing.

Q. Come and look at this photograph, Captain. Now, supposing that that is the broken rail that is out there up here?

A. Yes, sir.

Q. Did you notice these planking that are there?

A. Yes, I noticed these here.

Q. Now, how far to the east of that broken rail were you standing?

A. We were standing right in here. The rail is broke in here. We were standing right in there. That is where he was throwed over.

Q. Just a little to the west of that post?

A. Yes, sir.

Examination by the COURT:

Q. Did you notice that the truck was running out nearer to that side of the road-way when it took the turn than other trucks were running?

A. I didn't notice that truck coming along at all. I didn't see it until after it struck me.

Q. You had no knowledge that the truck was there until it began to turn?

A. Until it struck me. I heard them running back and forth there, and I didn't pay any attention, because they always kept clear of the railing.

Q. You didn't know that truck was running closer to the rail than other trucks?

A. No, sir.

(Witness excused.)

DICK TURPIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

Where do you reside, Mr. Turpin?

A. Vernon Avenue.

Q. How long have you lived in Portland?

A. Born at Oregon City; lived here pretty near all my life.

Q. What is your occupation?

A. Machinist.

Q. And how long have you been such?

A. Well, I served my time when I was 21 years old, and I will be 40 years old the 17th of March; about 19 years.

Q. Where were you on the 25th of March, 1911?

A. Putting machinery in the North Bank dredger, over by Mr. Supple's yard.

Q. Did you see the injuries that were inflicted upon Mr. Monical at that time?

A. Yes, sir.

Q. You saw the accident happen, did you?

A. Yes, sir.

Q. How far were you from it at the time?

A. Oh, I don't think we was over maybe 70 feet—something like that.

Q. Was there any one with you at the time?

A. Yes, sir: Mr. Smale, a fellow that was working with me, and Mr. Cohen. Mr. Cohen had just left. It was just noon, and we just sat down to eat our dinner.

Q. What time was it?

A. I think it was maybe five minutes after 12. We had just washed, and went out on the bow of the dredger to eat our dinner; and I was looking up this street that runs up to Mr. Supple's dock.

Q. How far away from the point where Mr. Monical and Captain Nelson were standing?

A. Oh, I should think in the neighborhood of 70 feet. I don't know just exactly, but it could not have been much further than that.

Q. Did you have a good view of them?

A. Yes, sir.

Q. And of the road-way?

A. Yes, sir.

Q. Did you notice the auto-truck coming along?

A. Yes, sir.

Q. Will you tell the jury what you saw at that time?

A. Well, we just sat there, me and Mr. Smale, to eat our dinner, and Mr. Cohen just went around on the boat to go up to the shop. We saw these two men stop. I didn't know either one of them. This truck came up. They stopped at this railing, right close to this pile of lumber. They were standing there talking, and the truck came around, and went to turn in to Mr. Jones's. This iron stuck out behind, and swept them right off the railing.

Q. Did it give any warning of any kind?

A. No, not at all.

Q. Did it blow any whistle?

A. No, sir.

Q. Or give any indication that it was going to turn in to this East Side Boiler Works?

A. No.

Q. Did it slow down to turn?

A. Well, it didn't seem to me like it did. He was going at a pretty good rate of speed when he come in there, I think.

Q. What rate of speed was he going?

A. I should think in the neighborhood of 12 or 15 miles an hour.

Q. Did it attempt to slow down when going to make the turn?

A. No; he went so fast he didn't make the turn. He ran into the side of the door.

Q. Was there any warning given by him of any kind?

A. Not that I heard.

Q. Did the two men that you saw there have any opportunity of escaping?

A. No, they did not have no chance at all.

Q. Why?

A. Well, they didn't hear no warning, and this iron stuck out from the end of the truck 16 feet. Mr. Shaver measured it when he was up there, and it stuck out 16 feet from the back of the truck; and it just swung around and knocked this man through the railing on one of these big plank that laid up there; and when it stopped it stuck out from the railing yet.

Q. Did you see Mr. Shaver when he measured it?

A. Yes, sir.

Q. Which way were these men looking, the plaintiff and Captain Nelson, when you saw them struck by that?

A. They were standing leaning on the rail, looking out towards the dredger where we was working. I suppose they was looking at the dredger. I don't know what they was looking at.

Q. Were their backs or faces to the auto-truck?

A. Their backs were to it.

Q. And the chauffeur saw them coming up there?

A. Why, certainly—sure. It is a plain open road-way or street. Anybody can be seen.

Q. Nothing to obstruct the view?

A. No, nothing at all.

Q. Do you know anything about whether the public generally are in the habit of using that road-way?

A. Yes, sir, all go out there.

Q. Both vehicles and pedestrians?

A. I have went out there with my machine—I have a machine. I went out there with that machine—rode out there with Mr. Beel, too.

Q. How long has it been in use in that way by the public generally?

A. Ever since Mr. Supple built his dock. I think in the neighborhood of maybe three or four years. I wouldn't like to say exactly, because I never kept any track of it, but I should think in the neighborhood of three or four years.

Cross-Examination.

Questions by Mr. PLATT:

You were sitting eating your lunch, as I understand?

A. Yes, sir.

Q. And were you in the beginning or the end of the lunch?

A. Just beginning to eat our lunch. It could not have been more than five minutes past 12.

Q. Right where were you sitting?

A. Right on the forward end of the dredger. We

had no machinery—there was no house.

Q. Which way was the dredger pointed?

A. The dredger was pointed toward the street where these men were walking.

Q. That is, pointed toward the south?

A. We was laying along the side of Supple's dock, on the inside, where he launches the boats, and the bow of the dredger was right up within, well, 30 or 40 feet of this street.

Q. That is, the bow of the boat was headed towards the south?

A. Yes, sir.

Q. And it was about 40 feet from this elevated road-way?

A. Well, I should think something like that. I couldn't say exactly, but somewheres in the neighborhood of 40 feet—wouldn't think much further.

Q. How near the bow were you?

A. We was right on the bow, sitting right on the bitts.

Q. Sitting there with your feet hanging over?

A. No, sir, not sitting with our feet hanging over. We were sitting on the bitts.

Q. And how many of you?

A. Me and Mr. Smale, the man that was working with me. And Mr. Cohen had just started to go up to the shop to his dinner.

Q. Which way were you faced?

A. Facing the street where the auto was coming.

Q. Two of you sitting on the bitts, facing in the same direction?

A. Yes, sir.

Q. Where were the dinner pails?

A. We had our lunch up eating it.

Q. Did you have it in a dinner pail?

A. No, we had it in a paper bag.

Q. Oh, I see.

A. We didn't take it out of the paper bag.

Q. And you were not very hungry?

A. Well, we had worked pretty hard. I was pretty hungry.

Q. Your attention was not on the lunch—it was on this road-way?

A. Yes, sure; that is what I had it for.

Q. That is, which were you looking at most observingly—the road-way or the lunch?

A. Well, we were eating and looking at the same time.

Q. I see. Looking between bites, you mean?

A. Between bites, yes, you might call it.

Q. Now, did that auto-truck make any noise on that elevated road-way as it came down there?

A. Well, it made about the same amount of noise that they all do. They are going in and out there all the time.

Q. They make a good deal of noise going over that planking, don't they?

A. I suppose there must have been fifty auto-trucks went in every day.

Q. And they make a good deal of noise going over that planking?

A. Yes.

Q. Acts as a sounding board?

A. Yes.

Q. You say you have driven in there with your automobile?

A. Yes, sir.

Q. You are a capitalist?

A. Not very much of a one, but I can afford an automobile.

Q. Now, in coming in from Water Street there, there is a pretty bad place before you get onto that planking, isn't there?

A. Oh, no, that is not very bad. That is a very good road, I think.

Q. Isn't there a sharp incline there, at an angle of about 30 to 35 degrees from the road-way over some filling of macadam before you strike the plank?

A. No, I will tell you, it is just the same as turning the corner on any street.

Q. You are satisfied of that?

A. Yes, sir.

Q. Because we are going to take the jury out there, and they will see that entrance. You would just as soon go down from Water Street onto that planking as you would to take a whirl down here from Morrison Street into Fifth?

A. No, not if I had any business to go out there, I would just as soon.

Q. I mean, as far as the character of the street is concerned?

A. Yes, sir; yes, just as good.

Q. Now you spoke a moment ago about you saw

these men walking. Were Nelson and Mr. Monical walking when you first saw them?

A. I didn't pay any attention to whether they was walking, but we looked up and saw them standing there, and they was so close to us we couldn't help but look right up and look at them. I know they had just stopped, and was talking.

Q. They were standing there looking over this rail toward you?

A. Yes, sir.

Q. Now, how close was your barge that you were working on—dredge—to the red cement warehouse of Mr. Supple?

A. How close were we? Well, I think we were tied to the dolphins right there by it.

Q. And the boat was afloat then?

A. Our boat, yes.

Q. Now you were tied, then, down in here on this east side of this piling underneath Supple's road?

A. We were tied right along here, lying right along here, the bow lying right here. These men were standing right here, right along here somewhere.

Q. So you were down in here? In order to see them, you looked up by the end of this planking?

A. Oh, no. When this thing sprung over this way, it knocked one of these boards over here. Some of the people thought it knocked the railing off. The iron stuck out over here.

Q. There was a piece of this railing out over here, wasn't there?

A. I didn't know that. I didn't pay any attention to it. We thought it knocked the railing out.

Q. Did you see this pile of planking here?

A. Yes, sir.

Q. (Juror) The bow of your boat was pointing north?

A. Yes—the bow of our boat was pointing south. We was just like this. They were standing right here, and we were laying here. They was leaning on the railing here, and we was sitting on the bow of the boat right here.

Redirect Examination.

Q. You have seen other men standing at this railing, have you, while auto-trucks have passed?

A. Yes, lots of men have stood there and watched us working on the dredger.

Mr. PLATT: I don't suppose negligence on the part of some one else would be a defense in this case.

COURT: It only goes to show whether there was negligence. I think that is competent.

Q. Did you go to pick up, or assist to pick up Mr. Monical after the injury?

A. Yes, sir.

Q. What was his condition?

COURT: That was not asked on cross-examination. Do you want to open up that subject?

Mr. ST. RAYNER: That is right. That is all, Mr. Turpin.

(Excused.)

G. J. SMALE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

Where do you reside, Mr. Smale?

A. 619 Union Avenue North.

Q. How long have you resided in Portland?

A. For about a year and a half. A little over.

Q. What is your occupation?

A. Pipe fitter.

Q. Where were you on the 25th of March last?

A. Why, I was on the dredge, North Bank dredge, pipe-fitting on it.

Q. At the same place where Mr. Turpin has just testified about?

A. Yes, sir.

Q. Were you there with him at that time?

A. Yes, sir.

Q. Did you notice at that time the plaintiff in this case and Captain Nelson standing upon the road-way at the railing that Mr. Turpin has testified about?

A. Yes, sir, on Mr. Supple's dock.

Q. How?

A. The road-way leading to Supple's dock.

Q. Did you see them at that time?

A. Yes, sir.

Q. What were you engaged in doing?

A. Why, we just went up to sit up on the bow of the scow to eat our dinner. It was along about dinner time. It might have been five minutes after 12.

Q. Did you see the auto-truck coming along?

A. Yes, sir, it came in from Water Street.

Q. Coming from Water Street?

A. Yes, sir.

Q. Going west?

A. Going west.

Q. To the Supple dock—towards Supple's dock?

A. Yes, going in the direction of Supple's dock, yes, sir.

Q. Did you see it when it struck the plaintiff?

A. Yes, sir.

Q. Prior to the time that it struck the plaintiff, did you hear it give any warning?

A. Why, I seen it didn't give no warning whatever. I seen it coming from Water Street—come through there at the rate of 12 or 15 miles an hour.

Q. And how fast was it running at the time that it struck the plaintiff?

A. Why, it struck the plaintiff when he was trying to make a turn to go in to the East Side Boiler Works.

Q. What did it strike him with?

A. The end of the angle-iron projecting out from the tail end of the truck.

Q. Do you know how long those irons were protruding from the back of the truck?

A. Why, they were quite a long distance out, but it looked to be 14 or 16 feet—something like that.

Q. And what was the position of the plaintiff at the time that he was struck in regard to these irons?

A. Why, they looked to be standing talking on the road-way there along the railing.

Q. Well, was his face toward the truck, or his back?

A. They were facing toward the ways—towards

Supple's ways, down near where we was working. I thought they were looking at the scow where we was working.

Q. And his back to the truck, was it?

A. Yes, sir.

Q. Now, did the truck slow down when it went to make the turn?

A. Why, it didn't make the turn. It ran into the side of the building there.

Q. Which side did it run into?

A. The west side of the entrance going in.

Q. Now, did it attempt to slow down when it was making the turn to go in there?

A. Why, it came in just about the same speed as it did leaving Water Street, and he attempted to turn, and he ran into the building.

Q. Did you see the plaintiff when he fell over, or was knocked over the railing, or through the railing?

A. Yes, sir.

Q. Tell the jury how you noticed it.

A. Why, we were eating our dinner, just went up to eat our dinner, and on the bow of the scow, I should judge 70 feet from where the man fell. And this auto-truck came in from Water Street, and come in at a terrific speed and attempted to make a turn going in to the East Side Boiler Works, and in turning, why, this long angle-iron projecting over the tail of the truck swept him off the railing, off the dock.

Q. Did you notice anything about a plank that was on that side of the railing, or rather that side of

the roadway—pile of planking?

A. I seen some plank piled up there, and there was one of them laid upon its side. We thought it was going to come down on the man after he had fell; but I didn't go up there to examine it, or anything of the kind. I saw the plank sticking up.

Q. Was that the plank that was knocked over the railing that you are talking about—partly?

A. That is the one, yes, partly over the rail.

Q. How far did it protrude from the railing after it was knocked?

A. Why, I couldn't say just exactly. It protruded over the rail—we thought it was coming down every moment, till somebody removed it; but just how far I couldn't say.

Q. What kind of a view did you have of the truck, would you say, coming up the road-way, and the plaintiff and this other man that was standing with him?

A. Why, we had a clear view of it. There was nothing to obstruct our view from it whatever. We was on the open deck of the scow, about 70 feet from where the accident occurred. There was nothing to stop us to see it.

Q. Was there anything to obstruct the view of the chauffeur who was operating the truck, so that he could not see these two men on that road-way?

A. No, sir, not a thing to obstruct his view.

Q. Have you seen other men standing at that railing and looking down?

A. Yes, sir.

Q. When automobiles have been passing?

A. Yes, sir.

Q. How often do they do that?

A. Well, several times through the day we have looked up, and saw them standing on the road-way looking down at us working on the dredge, setting in machinery and one thing and another.

Q. And trucks going by, auto-trucks?

A. Yes, sir, all kinds of vehicles.

Q. To what extent has the public been using that road-way, Mr. Smale, to your knowledge?

A. Why, as far as my judgment is, there is cement docks out there and one thing and another, they use this roadway going out to it, and to the East Side Boiler Works, and Jones's, and out to the boats that are landing in there, that is, tow boats, employees from them go back and forth, and other people. I have been back and forth there myself several times.

Q. It is open for the public generally?

A. Yes, sir, open for the public.

Q. Both vehicles and pedestrians?

A. Nothing to stop them. In fact, the city has sewerage pipes laid in from Water Street right along this runway into the river.

Q. Did you see the plaintiff after he was on the ground?

A. Yes, sir.

Q. Did you go to help pick him up?

A. I went up there, but others had picked him up.

Q. Did you see what his condition was then?

A. Why, he was unconscious. I thought he was

dead. I give him up for dead—didn't think there was anything more to do.

Q. Where was he lying at the time?

A. Laying on some logs.

Cross Examination.

Questions by Mr. PLATT:

Have you ever operated an automobile?

A. No, sir.

Q. And have you ever held a watch on an automobile?

A. Why, I can read them if I go and look at them.

Q. So when you say this truck was running at 15 miles an hour, you are simply guessing at it?

A. Yes, I guessed it between 12 and 15. It was coming at a terrific speed in there.

Q. On a roadway 20 feet wide, running at 15 miles an hour, trying to make a turn, it would push the whole building down, wouldn't it?

A. Why, I don't know about that—don't think it would.

(Excused.)

(Adjourned until tomorrow morning at 10 o'clock.)

Portland, Oregon, January 5, 1911, 10 A. M.

WILLIAM CHARLES COHEN, A witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. ST. RAYNER:

Where do you reside, Mr. Cohen?

A. Grand Union Hotel, on the East Side.

Q. How long have you lived in Portland?

A. It will be three years this coming May.

Q. What is your occupation or business?

A. Heating—steam and hot water heating.

Q. How long have you been engaged in that business?

A. Here in Portland?

Q. Yes.

A. A little over, about two years.

Q. Where were you in the morning, about noon of the 25th of last March, when the accident to Mr. Monical, the plaintiff in this case, occurred?

A. I was on the dredge that was floating in the river just there off Supple's dock.

Q. And how far were you from where the plaintiff was standing at the time of the accident?

A. I should think it was about 200 feet.

Q. Did you have a clear view of the plaintiff at that time?

A. Yes, sir, nothing to hinder.

Q. And of the road-way known as the road-way from Water Street to Supple's dock, are you acquainted with those premises?

A. Yes, sir.

Q. How long have you known them?

A. A little over two years.

Q. Did you notice at that time an auto-truck coming along the road-way from Water Street, on Supple's dock?

A. Yes, sir.

Q. Will you tell the jury what you saw there when that auto-truck came along?

A. Well, I was standing, as I say, on the dredge that was being built by the North Bank Road, and I saw a truck coming off Water Street, coming down that elevated road-way, or the road-way rather, there. And I saw two gentlemen standing with their arms up on the railing, the railing that was built along the plank road-way. I suppose that I saw the truck when it was 40 feet, possibly, from the two gentlemen—I couldn't say—something near 40 feet, though, I presume. And the next moment, or just a moment following that, I heard somebody cry, and I saw the old gentleman pushed off the road-way and falling down.

Q. What rate of speed was the truck running at at the time that you saw it?

Mr. PLATT: Objected to, unless the witness first be qualified as to knowledge of speed.

Q. Did you take note at the time of the rate of speed that the truck was running at?

Same objection.

A. Well, no, I don't know that I did.

Mr. PLATT: Just a moment. I would like a ruling on that.

A. I don't know that I did.

COURT: Have you had any experience running automobiles?

A. Yes, sir, I own one myself.

COURT: I will overrule the objection.

Mr. PLATT: All right.

A. I will just say that I own a truck myself, and I am familiar with it.

Q. How long have you owned it?

COURT: Well, never mind. Go on.

A. A little over a year—about a year.

Q. Did you notice what rate of speed it was running at?

A. Well, I know it was running pretty fast.

Q. How fast, Mr. Cohen?

A. Well, I should say between 10 and 15 miles.

Q. And was it running at that rate of speed when it struck the plaintiff?

A. I think so, because it was right—it was very close to the plaintiff when I noticed it, and the next instant I heard the plaintiff holler, or some one holler, and I looked up there again. There was a moment in there that my vision was off.

Q. Did you notice what, if anything, was on the truck behind at the time?

A. It was some iron of some kind.

Q. How long was it, did you notice?

A. No, sir, I did not.

Q. Did you notice what it was that struck the plaintiff?

A. Well, I couldn't say that I know what struck him, but I suppose it was the irons, from the position of everything.

Q. Did you notice any opening in the railing at that place, near where the plaintiff was standing?

A. There was an opening a little to the west of the plaintiff.

Q. How far west was it?

A. I couldn't say just how far, but it must have been only just a few feet, at the most.

Q. Did you notice any lumber piled there?

A. Yes, sir.

Q. What position was the lumber piled in?

A. Well, it was piled lengthways of the road-way, up against the outer edge or railing side.

Q. How high was it?

A. It must have been something like two or three feet high. I couldn't say positively.

Q. Did you notice whether or not one of the planks that was piled there was knocked out or not?

A. Yes, sir.

Objected to as leading.

Mr. ST. RAYNER: I will try not to put a leading question.

Mr. PLATT: The witness is intelligent.

COURT: I think that question is leading.

Mr. ST. RAYNER: Yes, your Honor.

Q. Did you notice anything in reference to one of the planks being different to the other planks, as to its position after the accident?

A. It seems to me that it was slid a little to the west, and turned with the end pointing off the tramway. I wouldn't be sure.

Q. In which direction was the end pointing from the tramway?

A. Well, it would be across the tramway a little; it seems as though it slid down and shoved the end off the tramway a little; that would be pointing off the tramway, would be pointing south, I presume, or north. Let's see—down the river.

Q. Towards Morrison Street?

A. Yes, sir.

Q. That would be to the north?

A. Yes. I get the directions mixed up.

Q. And how far was it overhanging?

A. I couldn't say. Something like six feet, or something like that. After the old gentleman fell, I never paid any more attention, but I ran down and helped pick him up, and didn't give any attention at all to it.

Q. When this automobile truck was coming along there, did it sound any gong?

A. I didn't hear any.

Q. Whistle, or give any warning?

A. I didn't hear it.

Q. Do you know anything about whether that road-way has been used by the public generally?

A. It has since I have been acquainted with the place.

Q. Ever since you have been?

A. Yes.

Q. For what kind of travel?

A. Well, to and from Supple's dock with all kind of hauling, and from the Willamette and Columbia River Towing Company with all their deliveries of stuff, either to and from the boat and for general traffic that would come up off those boats.

Q. Both vehicles and pedestrians?

A. Yes, sir.

Q. Do you know anything about whether there has been any habit of men standing at that railing where you saw this plaintiff at that time?

Mr. PLATT: Objected to on the ground that it is not competent. Contributory negligence of somebody else would not excuse this.

COURT: I don't think that is competent. You can inquire as to how that tramway was used by pedestrians.

Q. Well, I will ask you, how was that tramway used by pedestrians? How was it used? In what way?

A. Just whenever they wanted to use it, for any and all purposes, so far as I know, ever since I have been there ;and I have been right there for two years.

Q. In what portions of it would they walk or stand?

A. Well, usually on the outside, next to the railing.

Q. Where this plaintiff was?

A. Yes, sir.

Q. Now, at the time that the automobile truck was turning, as you have stated, into this gateway, which direction was the plaintiff's face?

A. Toward Morrison Street.

Q. And his back toward the truck?

A. Yes.

Q. Did you notice the plaintiff after he had been knocked over the railing?

A. Yes, sir. I helped pick him up and put him in the ambulance.

Q. What was his condition when you saw him, when you picked him up?

A. I don't know what his condition was, but I

thought he was dead. I guess he wasn't.

Q. Was he conscious?

A. No.

Q. He was insensible, was he?

A. I think so.

Q. How?

A. Yes, I should think so. He didn't seem to have any life at all about him.

Q. Did you notice whether the plaintiff was knocked over the railing or through the opening that you have testified about?

A. Knocked through the opening. If it hadn't been for that opening, I think the iron would have cut him in two against that plank that was lying there.

Q. If it hadn't been for the opening in the railing, you think the iron would have cut him in two against the planking?

A. I think so. I don't see how it could help it.

Cross Examination.

(Questions by Mr. PLATT:)

Where were you standing, Mr. Cohen?

A. I was standing on the dredge that was being built for the North Bank road, just off Supple's dock.

Q. What part of the dredge?

A. I was standing on the deck. It was just an open deck dredge there.

Q. I know, but what part of the vessel?

A. What part of the vessel?

Q. Bow or stern, or midships, or where?

A. It must have been something like about middle way.

Q. About the center?

A. Yes,

Q. On which side—the east or west side?

A. The east side.

Q. Were there any upper works on this boat at that time?

A. No.

Q. Just a hull?

A. Just a deck.

Q. And the first time that you saw this truck, you say, was about 40 feet east of where these two men were leaning against the railing?

A. Something near 40 feet, I presume, yes.

Q. What attracted your attention to the truck?

A. Why, I had a couple of men working there, and they were going out, and just about ready to land onto the wharf—onto the ground, on either a plankway or float they had to go backward and forward to the dredge on; and I looked over to see where they were, and they were right between me and the truck. They were on the ground, and the truck was right up on the roadway. And I saw the truck coming as I threw my vision across that way.

Q. Making considerable noise on that elevated roadway, too, I suppose, loaded with iron?

A. Well, of course if you take a truck that is running on a plank roadway that way, it makes a certain amount of noise, yes; but as far as the noise was concerned, I don't say that I heard any noise, only just saw the truck.

Q. But there would be considerable noise connected with a large automobile truck, loaded with iron, running

on an elevated roadway built of plank, wouldn't there?

A. Take a plank roadway built solid like that was, there wouldn't be any extraordinary amount of noise.

Q. Well, I didn't ask you whether there is any extraordinary noise. I said that there would be considerable noise?

A. I don't know that I could say just how much noise ought to be made with one, no.

Q. Now, at what angle were you to this roadway, as you stood there?

A. From the position where I was standing to the position where the plaintiff was standing, I suppose.

Q. Towards where you first saw the truck?

A. Making something like at an angle of 45 degrees, I presume, or nearabout.

Q. And did this truck have a top on it?

A. It seems to me—I don't remember, but it seems to me that there was either a top on it, a full top, or a kind of a buggy top. I won't be sure.

Q. How high did the sides of the truck come above the running gear?

A. How is that?

Q. How high do the sides of the truck come up above the running gear in which the load is inclosed?

A. Oh, I couldn't say; I couldn't say that.

Q. Well, they run three or four feet, don't they, as a rule?

A. Above the running gear?

Q. Yes.

A. No, they don't run—they don't average three or

four feet.

Q. Well, 2½ feet?

A. I presume something like that.

Q. Well, now, describe this particular truck which you say you saw there.

A. I couldn't describe the truck, because I didn't notice it sufficiently.

Q. Well, I thought you said you saw this iron sticking out from the back of it?

A. Yes, but I didn't pay any particular attention to the truck particularly.

Q. How could you see iron sticking out of the back of a truck—

A. When I went up there—

Q. Wait a minute till I get through with my question. How could you see the iron sticking out of the back of a truck coming towards you, and you were standing at an angle of 45 degrees, when this truck either had a top or a partial top, and sides running up 2½ feet, between you and the material?

A. The material was sticking out of the back end of the truck.

Q. Well, how could you see it?

A. With my eyes.

Q. Yet you cannot tell this jury whether it had a top on it, or whether the sides came up 2½ or three feet, or 4 feet, and yet you saw this iron?

A. I saw the iron was sticking out over the railing when I ran down to pick the old man up, this iron was sticking up there.

Q. You saw it after the accident?

A. Yes, I saw it before and after.

Q. You saw it before the accident, although you cannot tell whether this truck had a top on it or not, or how high the sides came up, or what the character of the truck was, and you were standing at an angle of 45 degrees?

A. I didn't pay enough attention to the truck to notice just what kind of a truck it was.

(Excused.)

JOHN R. KELSO, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER:)

Where do you reside, Mr. Kelso?

A. Milwaukee, Clackamas county.

Q. How long have you resided in Oregon?

A. 21 years.

Q. What is your business or occupation?

A. I am now running a confectionery and cigar store.

Q. Where were you on the morning of the 25th of last March, about noon, at the time of the accident that is being investigated?

A. I was here in Portland, walking across from the West side to the East side.

Q. The East side of where?

A. The Morrison bridge, or on the East side of Morrison bridge, on Water street.

COURT: You were on the bridge?

A. On the Morrison street bridge, yes, sir.

Q. And while you were crossing the Morrison street bridge, did you see the plaintiff in this case?

A. I did.

Q. Where was he?

A. I was standing on this side, the end of the bridge, looking across. I was to meet my son at 12 o'clock. He was working for Mr. Jones in the machine shop, and I was waiting for the noon hour, kind of stepped on the end of the bridge there, near the end, and looking across to see if I could locate him. He was working on a boat.

COURT: How far were you away?

A. I judge about two blocks.

COURT: What do you want to prove by this witness?

Mr. ST. RAYNER: I want to prove that he saw the accident, your honor, and the rate of speed that the automobile was running, and also that he went over.

COURT: That is too far away for the witness to tell much about it. He said he was over two blocks away, or about that.

A. About that.

Mr. ST. RAYNER: He had a clear view of it, your Honor.

COURT: Well, he can testify to it.

Mr ST. RAYNER: Yes, your Honor, for what it is worth, I want it to go in.

Q. Did you have a clear view of the plaintiff where he was standing on the Supple roadway at the time?

A. I did, sir.

Q. What did you observe?

A. Why, I noticed the two men standing, one of them had both arms on the rail, and it seemed they were in conversation. And just at that, while I was watching, happened to look over and saw the two men standing there, and at that time the tutomobile swung in, and I seen one of them kind of stoop down and made a pass at the other one. My impression was that he was striking at the man. At that time the man turned around and come to this opening in the rail, and fell down onto the logs.

Q. How far was the automobile away before you saw it strike in that way?

A. I didn't notice the automobile, to notice it, until it came down, and just to make the turn into the opening there.

Q. Did you notice how fast it was going?

A. I couldn't tell you as to that at all.

Q. Was it going fast or slow?

A. It come around on a swing. I couldn't tell anything about it. I was a good ways off from it.

Q. Did you see the plaintiff after he fell?

A. I did, sir.

Q. Did you go over to where he was?

A. I did.

Q. What was his condition then?

A. He was laying unconscious. They had carried him just a little ways from where he had fallen off, and we put him on a tarpaulin, and I helped to carry him up on the bank a little bit further, and stayed until the doctor came and made an examination; helped to take his coat off. And plaintiff, in moving his arm, every time

we would touch his arm, he would groan and make a noise, and the doctor made the examination while I was there.

Q. You speak about the automobile swinging in. What do you mean by that?

A. It come down the roadway and made a turn, nearly a square turn, to go in to the south of where I was standing—straight south from me.

Q. To an opening?

A. Yes, sir.

Q. What opening was that, do you know?

A. I don't know. I am not acquainted—was not acquainted with the dock at all.

Cross Examination.

(Questions by Mr. PLATT:)

Will you describe again what you saw these two men do, the movements that you saw them make?

Which one did you see in action first?

A. The one on the east side.

Q. You saw him, you say, duck?

A. Ducked his head down.

Q. What he ducked down for, you don't know?

A. I don't know, no.

Q. Which way did he duck, towards the east or towards the west?

A. To the west.

Q. And do you know whether he struck the other man, or whether something else struck him?

A. I don't know. I could see him reach his hand, and my impression was that he struck at him. Now,

that is the impression that I had from where I was standing; but when I see the other man turning, I see there was something wrong. And as quick as he fell over the baluster, I started and ran just as fast as I could go till I got to the place.

Q. Could you tell how low he ducked, this man that stood at the east?

A. Why, I could not from that distance, no, sir.

(Excused.)

A. F. JOHNSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER:)

What is your full name Mr. Johnson?

A. Andrew Francis Johnson.

Q. Where do you live?

A. 1107 East Taylor.

Q. How long have you lived in Portland?

A. About six years.

Q. What is your occupation?

A. Shipping clerk.

Q. For whom?

A. Kelley, Thorsen & Co.

Q. Are you acquainted with Harry Kelly, the chauffeur who was in the employ of the defendant?

A. Not any more than as the driver of an automobile.

Q. You know him, do you, when you see him?

A. Yes, I know him.

Q. Did you have any conversation with him in regard to his operation of an auto-truck at the time that

plaintiff, Mr. Monical, was injured last spring?

A. I did about two or three days afterwards.

Q. Where was that?

A. It was at the store.

Q. At what store?

A. Kelley, Thorsen & Company's store.

Q. Tell the jury what he told you in regard to that accident.

Objected to as incompetent.

COURT: What do you want to prove by that?

Mr. ST. RAYNER: I want to prove by this witness the admission of the chauffeur as to seeing these two men when he was operating his truck in their direction, your Honor.

COURT: This occurred long after the accident?

Q. What time was it that you had the conversation?

A. About two or three days after the accident.

Q. Was he still in the employ of the company?

A. He was.

COURT: Upon what ground, now, do you expect to prove that?

Mr. ST. RAYNER: Upon the ground of an admission, if the Court please.

COURT: Do you think that the chauffeur at that time could make an admission that would bind the principal, three days after? This is not the part of the res gestae now, because it has gotten away two or three days from the time of the transaction.

Mr. ST. RAYNER: Yes, your Honor is correct on that, but the view I take of it is this: Under the law,

of course, the chauffeur and the master would both be liable in an action for damages, and whatever the chauffeur would say would be admissible either as against himself or his master. But I won't insist on it, your Honor, if they interpose an objection.

COURT: Very well. The Court will sustain the objection. I do not think it is proper.

(Excused.)

JOSEPH SUPPLE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER:)

What is your name, Mr. Supple, in full?

A. Joseph.

Q. Joseph Supple?

A. Yes, sir.

Q. How long have you resided in Portland?

A. About twenty years.

Q. Are you acquainted with the premises, Mr. Supple, known as the Supple dock, and the road-way leading to the Supple dock from Water street, on the East side of the river?

A. Yes, sir.

Q. How long have you known that?

A. Ever since they were built. I built them.

Q. When was it built?

A. Why, I think it was in 1906.

Q. What has it been used for, Mr. Supple, since it was built?

A. A roadway to go out to the river and the docks

out there.

Q. And whom has it been used by generally?

A. The public, everybody. Nobody had any privilege on it. As a public dock, that is all—a public roadway. I got a permit from the city to build it.

Q. Over the city street?

A. Well, I supposed it was a city street at that time. Since then they have had some controversy about it, and they claim that the streets from Water street out to the river belong to the blocks—to the center of each street belongs to the blocks. But at the time when I got the permit from the city, I supposed it was the city ruled the streets.

Q. And what street is it that you refer to?

A. Yamhill street.

Q. East Yamhill street?

A. Yes, the foot of Yamhill street.

Q. And you got a permit from the city to construct this roadway over the street, did you?

A. Yes, sir.

Q. From the harbor-line to Water street?

A. Yes.

Q. And you constructed it for the use of the public and for your own generally, did you?

A. Yes, sir.

Mr PLATT: I suggest, if counsel wants to be sworn—

Q. How has it been used.

COURT: Those questions are very leading.

Mr. ST. RAYNER: Yes, your Honor. I didn't think of that.

COURT: The witness can answer the questions.

Q. Then how has it been used since you constructed it, Mr. Supple?

A. It has been used for a public roadway, to get out to the docks.

Q. And in what way has it been used?

A. In what way?

Q. For pedestrians and vehicles, or what?

A. Yes, everybody used it. Walk out there, or drive, or go any way you want to go out.

Q. And by whose permission was that—yours?

A. Why, I got the permit from the city to improve the street. There were three blocks there, and there were a lot of old shacks and things obstructing these streets; and in 1905 Mr. Jones, owning the block south of me, and Mr. Leonard owning the block north of me—Mr. Wanzer was in the City Engineer's office, and he said if we got permits to fix the streets, to improve the streets, why, he would clear the streets out of the shacks, so we could get out to the dock. So we got these permits, but after we got them he could not clear the street out, so it ran on till the next year. Next year I built the dock out there fronting my property, and then I built this roadway at Yamhill street to get to the dock, and since then it has been a public highway—nobody has ever been refused to use it.

Q. And the public all use it?

A. Yes, sir.

Q. With your permission?

A. Yes, sir.

Cross Examination.

(Questions by Mr. PLATT:)

Now, this was built jointly by Captain Jones' company—the Willamette & Columbia River Towing Company and yourself, was it?

A. Well, when I built the dock, I built the dock, all that was in the water of it, and so when I built it I had an arrangement with Captain Jones, and I said, "Now, I will build it on your side of the street, and that will give me more room in the ship yard, and you can use the dock as much as you want that is fronting on your street and around there." And then when I got in as far as the street, about 150 feet from Water street, why, Captain Jones says, "I will finish up this dock." He says, "I don't want to use the dock unless I pay for part of it." So he finished that up, the last 150 feet to Water street.

Q. Now, this request that you made of the city for permission to build this structure there ran in the name of the Willamette River Towing Company as well as yourself?

A. Both of us. We got the privilege for to improve these two streets in 1905, in order to get these shacks out of the way, so that we could get out to use our property.

Q. Your primary object was to get these shacks out?

A. Yes, sir. After that I built the dock, and then I ran the street out on that permit. I never got any other permit.

Q. Now, in your application for leave to build this

roadway, you requested permission from the city to build it for your own purposes, didn't you?

A. I couldn't say about that.

Q. That was what you were trying to get, was access to your improvements that you either had or intended to make?

A. Yes. Yes, sir.

Q. And your application was in that form, and not in the form of permission to improve the street, was it not?

A. Well, as I told you, Mr. Wanzer—we wanted to get these shacks out of the way so that we could get out and use our property, and we could not get them—there was no way of getting them out of the street. They blocked the street. And Mr. Wanzer says, “You three people that own these blocks get a permit from the council from Water street to the harbor-line, and I will get the shacks out of the way.” So after we got it he could not do it then. So then we bought the people out and bought the shacks—Mr. Jones and myself.

Q. Well, now, you and Mr. Jones constructed this elevated roadway?

A. Yes, sir.

Q. And who has kept up the repairs on it?

A. I have.

Q. Has the City of Portland ever done anything towards the repair of it?

A. Not a thing. Not a thing that I know of.

Q. Has the City of Portland exercised any dominion over that structure since you built it?

A. No, sir, not that I now of.

Q. Is there any reason today why you cannot put a gate at Water street and shut anybody out of there that you want to?

Objected to as a conclusion of law and incompetent.
Objection overruled.

A. You say is there any reason?

Q. You and Mr. Jones.

A. Why, I don't know whether I could shut it up or not. If I could shut that up, I could shut the whole East side from the water.

Q. Now, your dock out there is used as a cement dock, is it not?

A. Mostly, yes, sir. We transfer anything over it.

Q. And automobile trucks go back and forth there a great deal to get cement?

A. Yes, sir.

Q. And turn in to this East Side Boiler Works with material for the Boiler Works?

A. Yes, sir.

Q. Now, this railing on the north side, at the time of this accident there was a piece of that railing out, was there not?

A. Yes, sir.

Q. And it was put back the next day, or a day or so following the accident, was it not?

A. Why, I couldn't say about that. It seems to me it was put back again.

Q. And it is in now?

A. I couldn't say about that either. There is a lot of it broke out. You know there is no law compelling me

to put a railing around a dock, but I had the lumber there, and I thought that, it being a new runway there, I would put that up; and as it has broken down, I have never repaired it. Some people have repaired it in towards Water street—put long sticks and things on—they have kind of put a temporary one. But as far as it has broken down, I have let it go, because I saw there was no necessity for it, any more than there would be to fence in any other dock in the city.

(Excused.)

WILLIAM E. JONES, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER.:)

Where do you reside Captain?

A. 252 East 36th street.

Q. How long have you resided in Portland?

A. 33 years.

Q. What business do you engage in?

A. Steamboating.

Q. Are you a member or an officer of the Willamette & Columbia River Towing Company?

A. Yes, sir.

Q. How long have you been such?

A. About 15 or 16 years.

Q. What official position do you occupy with that company?

A. Secretary and treasurer.

Q. And how long have you occupied that?

A. About that long. About 15 years, I think.

Q. Your company is the company that, in conjunction with Mr. Joseph Supple, constructed the dock and the roadway in question, was it?

A. Yes, sir.

Q. What was the purpose of the construction of that roadway, and for what has it been used since it was constructed, Mr. Jones?

A. It was to get to the dock and the river front.

Q. To the river front?

A. Yes, sir.

Q. From the harbor-line to where?

A. To Water street.

Q. And how has it been used by the public since then?

A. Well, the public has been using it. The public never was excluded from it. Everybody has the privilege there that wants to go there.

Q. How long have they had that privilege?

A. Ever since it was built.

Q. And how have they used it, for pedestrians and vehicles generally?

A. No, the vehicles hasn't any business there, that is, unless they were going to the dock. There is no outlet to it, only if they go out there, they have got to come back the same way.

Q. Do you know the plaintiff in this case—Mr. Monical?

A. Yes, sir.

Q. How long did he work for your company, if at all?

A. Why, as near as I can remember, it would be

about seven or eight years, probably.

Q. Were you aware of the fact that he was in the habit of going on that roadway, and upon your premises, on the south side of it?

A. Yes, sir.

Q. For how long has he been doing this?

A. Well, ever since we have been there occupying that.

Q. Did he go there with the permission of your company and yourself?

A. Well, I never gave him any special permission to go there; nor I never told him not to.

Q. Did you consider that he had a right to be there?

A. Yes, sir.

Mr PLATT: Oh, state the facts. This witness cannot pass on the law of this case.

Q. How long do you say he has been in the habit of going there, Mr. Jones.

A. Ever since the roadway was built.

COURT: That way was built for the purpose of giving access to your dock, or to Supple's dock there was it not?

A. Yes, sir. We had a private roadway of our own, but the roadway was wearing out, and we didn't care about rebuilding it and maintaining two, so we helped Supple build this roadway.

COURT: Well, the purpose was to give access to your dock?

A. Yes, sir.

COURT: And after it was built it was opened up to the street?

A. Yes, sir.

COURT: And then you allowed the use of it by such vehicles, or the people that desired to go in to your dock?

A. Yes, sir.

COURT: And passing in and out by that way?

A. Yes, sir.

Cross Examination.

(Questions by Mr. FALES:)

Mr. Jones what is your interest in that dock at the present time; that is to say, the Willamette & Columbia River Towing Company?

A. Well, no particular interest in the dock. Mr. Supple built the dock.

Q. I mean, in the roadway rather, Mr. Jones.

A. Well, we built about half the roadway.

Q. Do you claim to own half the roadway?

A. Yes, sir.

Q. If Mr. Supple would propose to give this away, would you think that you were entitled to an objection?

A. Yes, sir.

Q. Did you ever exclude the public from this roadway?

A. No, sir.

Q. Did you ever grant members of the public who had no particular business either at the Supple dock or at your own premises permission or direction to use it?

A. No. I never gave anybody privilege to use it, and never told anybody not to use it.

Q. Is there any sign on the dock stating that it is

a private road?

A. No, sir.

Q. Did you ever put one there?

A. No, sir.

Q. You have described another roadway that you used to use formerly, in connection with your description of your building of this one. Will you state for what purpose the old roadway is used at this time?

A. Just for foot traffic.

Q. Is it a proper method of ingress and egress to your particular dock, that you use yourselves for your own boats, for foot passengers?

A. Yes, sir?

Q. Is it the one that is used principally by your men going to your boats, or people having business with your boats?

A. Well, it is between our office and the boats, because it is further around by the roadway in the street.

Q. Men who are employed upon your boats would naturally use the roadway on the north side, would they?

A. If they were going between the office and the boats. they would.

Q. Rather the south side.

A. If they were going between the office and the boats, they would use it, but if they were going to town, towards Morrison street, why, there is no preference.

Q. If the men were in the transaction of your business, ordinarily, then, would they use the south one in preference to the north?

A. Well, they would if they were coming to the office.

Q: State whether or not they sometimes would go the other way, and if so, for what purpose?

A. Well, they might have different purposes. They might have the object of getting up town without being seen, or something like that, without passing the office.

Q. That is to say, if they wanted to go up town, and they didn't want you to know it, they might go out that outside roadway?

A. Yes; they wouldn't have to pass the office on that roadway.

Q. They would sometimes go over to town, then, when you would rather they would not?

A. Well, they might go over sometimes when, for instance, the boat might be laying waiting for orders, and they wanted to run over town quick and back, they might just pass up the other way so nobody would see them.

Q. Have you ever excluded foot passengers from the roadway, or rather the foot walk on the south, next to your office?

A. No, sir.

Q. Would they use this roadway in getting to your warehouse on the south, the one next to your office?

A. Well, it runs right into the warehouse.

Q. How near is the warehouse from the entrance on Water street to that roadway on the south?

A. About 30 feet.

Q. How much further would it be to go the other

way, around the north, on the outside roadway?

A. The roadways are about 30 feet apart, I think.

Q. Yes, but would they not have to go away down to the entrance to the East Side Boiler Works, in order to get around back to the warehouse?

A. Well, they would have to go 60 feet, probably—30 feet each way, to get to the roadway that is in the street.

COURT: What is the object of this cross-examination?

Mr. FALES: It is simply our desire, if your Honor please, to show the condition of the property by this witness.

COURT: I think that is pretty well understood. You are taking up a good deal of time of the court. Unless there is some special object, I don't think it is necessary to prolong it.

Mr. FALES: Very well, your Honor.

(Excused.)

GEORGE WARNER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER:)

Where do you reside, Mr. Warner?

A. 1542 Deleware Avenue, Portland.

Q. How long have you resided in Portland?

A. Since 1891.

Q. What business or occupation are you engaged in?

A. Boilermaker by trade.

Q. For whom are you working?

A. The East Side Boiler Works.

Q. How long have you been working for them?

A. Five years

Q. Were you working at the East Side Boiler Works, or were you present at the East Side Boiler Works premises on the morning, about noon, of the 25th of last March, when Mr. Monical, the plaintiff, met with the accident that is being investigated?

A. Yes, sir.

Q. Where were you at the time?

A. I was in the shop.

Q. Did you receive anything from the chauffeur at that time, who was operating the auto-truck, Harry Kelly?

Mr. PLATT: I would like to have the question framed so that we understand what he means—received something.

COURT: I suppose that will develop. You may answer the question.

Mr. ST. RAYNER: I asked him if he received anything from the chauffeur who was operating the auto truck at that time. Did you receive the load from him?

COURT: You may answer that question.

A. The driver of the wagon came to me in the shop, and says that he had a load for me—

COURT: Never mind. He asked you if you received anything.

A. Just received the slip of the load. He reported that he had the load there.

COURT: Never mind. Answer the question direct.

Q. Did you receive the load from him?

A. No, sir.

Q. You received the slip, you say?

A. Yes, sir.

Q. What was that slip in reference to?

A. To the amount of material or the kind that was on the truck.

Q. Have you that slip now?

A. The slip is right there, I believe?

Mr. ST. RAYNER: I hand the witness a paper, your Honor.

COURT: What is it?

Mr. ST. RAYNER: It is the receipt, the slip that was handed to him by the chauffeur, of the load, so as to show the length.

Q. What is that paper, Mr. Warner, you are holding in your hand?

A. Well, that is a paper that is issued in duplicate and triplicate form, showing the amount of material and the kind that is on wagon. One we keep and two we sign. One is to be kept by the driver, and one is to be returned to the house that he delivers for.

Q. From whom did you receive that?

A. From Mr. Kelly, I believe, the driver.

Q. At what time?

A. About 12 o'clock.

Q. Before or after this accident?

A. Just after the accident.

(Thereupon counsel for defendant offered said receipt in evidence.)

COURT: I understand you offer that to show the length of that iron?

Mr. ST. RAYNER: For the purpose of showing that he received the slip of the load that the cauffeur was carrying, your Honor, and I propose afterward to show by the witness the length of the irons that he was carrying.

(The same was then received in evidence without objection and is hereto attached and made a part hereof, and marked "Plaintiff's Exhibit A.")

Q. Did you have any conversation with Mr. Kelly at that time, immediately after the accident?

A. Yes, sir.

Q. What did he say to you?

Mr. PLATT: Well, hold on a minute. Is this with reference to this angle-iron, or with referenuce to the accident, or what?

Mr. ST. RAYNER: In reference to the accident, your honor. This is a part of the res gestaie.

COURT: How long after?

Mr. ST. RAYNER: Immediately, your Honor, at the time of the accident.

COURT: How long after the accident happened was it when you had this conversation?

A. Very shortly.

COURT: A few minutes?

A. Very few minutes.

COURT: Fifteen minutes or half an hour?

A. I don't think it was fifteen minutes.

COURT: I don't think it is proper. I don't think it

is proper *res gestae*. It must be while the transaction was being pursued.

Q. Was it before the plaintiff was picked up?

A. I don't understand you.

Q. Was this conversation that you had with Mr. Kelly before the plaintiff was picked up?

A. The material, you, mean, on the wagon?

Q. No, was the conversation that you had with Mr. Kelly, that you referred to, before the plaintiff was picked up from the ground?

Mr. PLATT: There is nothing in here yet to show this witness knows anything about it.

A. I couldn't say.

COURT: He says he couldn't say. What they mean by the *res gestae* is, it is part of the transaction then and there taking place.

Mr. ST. RAYNER: Yes, your Honor.

Q. Did you notice where the auto-truck was when you went outside?

A. Yes, sir.

Q. Where was it?

A. In the roadway, diagonally across the road.

Q. Did it make the entrance to the Boiler Works?

A. Not enough to clear it to go on in.

Q. Describe to the jury where the auto-truck struck on the side of the roadway, as near as you can.

A. The auto-struck struck, it would be the south-west corner of the building. There is an old boiler standing there, and it is kind of protected with the boards and a sliding door, and the auto-truck came in around that way, and the wheel on the right hand side

of it would not clear the building; he would have to back in order to clear again.

Q. How much did it lack of clearing?

A. Oh, considerable. It must have been $2\frac{1}{2}$ or three feet.

Q. Do you know what the length of the irons were that he was carrying at that time, the angle-irons?

A. About 30 feet.

Cross Examination.

Questions by Mr. PLATT:

What is the width of the roadway there at the entrance to the boiler works?

A. Do you mean the roadway running east and west?

Q. The roadway, yes, running east and west?

A. Oh, I should judge 22 or 24 feet, probably.

Q. And what is the length of one of those automobile trucks?

A. 18 or 20 feet.

Q. Now, do they come in and out of that Boiler Works quite frequently with material?

A. Yes, sir.

Q. They never can make that entrance, can they, without backing and getting a second start?

A. I never seen it before fail. They can always make the turn if they turn at the proper time?

Q. Well, you say that an auto-truck 20 odd feet in length, with some angle-irons sticking out 10 or 12 feet, can make that turn?

A. Yes, sir.

Q. Without having to back?

A. Yes, sir.

Q. Did you ever do it with an automobile?

A. I never done it with an automobile, but I could do it if I understood my business and knew how to run one.

Q. Now, you say that you received this slip?

A. Yes, sir.

Q. Did you receipt for it?

A. That is the one that I received.

Q. Well, did you receipt for the material?

A. No, sir.

Q. You say there wasn't any material left there?

A. What?

Q. Was the material left there?

A. Yes, sir.

Q. Who did receipt for it?

A. I couldn't say.

Q. I thought you said on direct examination that the material was not left, only the slip?

A. The material was left.

Q. Was left?

A. Yes, sir.

Q. Well, how did you come to accept the slip and not receipt for the material?

A. During the excitement, the noon hour came on, and we walked off and left it as it stood, and when we got back from lunch, the auto was unloaded and gone.

Q. You don't know who did unload it?

A. No, sir.

Q. Or who did receipt for the goods?

A. No.

Mr. ST. RAYNER With the Court's permission, I would like to ask the witness one question I omitted.

COURT: Very well.

Direct Examination Continued.

Q. In running into this southwest corner of the entrance to the boiler works, did the truck knock down anything?

A. Well, it splintered a board there—one of the boards that protect the old shed.

Q. Did you notice anything about it having knocked a board off in the roadway, a plank on the north side?

A. There was a number of piles of lumber there. I believe they were 4x12, about 22 feet long. This angle-iron had struck one of those boards and shoved it bodily endways about six feet, veered it on an angle around the other way.

Q. How much did it knock it over?

A. It was hanging over the dock six feet, probably, or eight.

Q. Did you notice any indentation in the plank caused by it?

A. A big sliver knocked off the side of the plank.

Q. Do you know how heavy that planking was?

A. I couldn't say; possibly with green lumber—I couldn't say whether it was green lumber or dry.

Q. Was it very heavy?

A. Yes, sir.

Q. How big?

A. 4x12, about 22 feet.

Re-Cross Examination.

Q. Did you see the accident?

A. No, sir, I didn't see the accident.

Q. Did you see this plank struck?

A. No, sir.

Q. All you know about it is what somebody told you afterwards?

A. What I know is what I saw with my own eyes.

Q. You saw afterwards?

A. A few minutes after the accident.

Q. You don't know whether that plank was struck with the angle-iron, or what it was struck by, do you?

A. No, sir, I couldn't say that I do.

Re-Direct Examination.

Q. Was the truck standing there at the time you saw it?

A. The truck was standing there, and nobody with it.

Q. Stretched across the roadway?

A. Yes, sir.

Examination by Juror.

Q. Was the truck injured in any way that you noticed, the wheel, where it struck?

A. No, not that I could see.

Q. The building injured?

A. The planks were only 1x12, the boarding on the side of the building was only 1x12.

Q. Didn't break them?

A. Splintered one of them.

Q. Nothing else to prevent pushing the board

through?

A. Oh. no.

Q. The wheel hit, did it?

A. The wheel struck.

(Excused.)

Dr G. M. MAGRUDER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ST. RAYNER.)

What is your profession, Doctor?

A. I am a physician.

Q. For whom?

A. U. S. Marine Hospital Service.

Q. Government position?

A. Yes, sir.

Q. How long have you been such, Doctor?

A. 25 years.

Q. And during that time have you been residing in Portland?

A. For about five—a little over five years.

Q. Is your practice with the public generally, or merely the Government employees?

A. No, my practice is confined to Government work.

Q. Were you called upon to examine and treat the plaintiff in this case?

A. Yes.

Q. Some time during last March?

A. Yes.

Q. When did you first see him, Doctor?

A. On March 25th.

Q. And where was he at that time?

A. He was then in the hospital.

Q. Which hospital?

A. St. Vincents.

Q. What did you find his condition to be at that time, Doctor?

A. He had a fracture of the left humerus, that is the bone of the arm, a little above the middle, the junction of the upper and middle third; also a fracture of the radius at the wrist joint; a fracture of one of the ribs, about the eighth and ninth—I don't remember exactly which. He had a very severe contusion of the left hip and thigh, extending from above the joint down to the knee and probably below the knee. I am not sure about that point. The thigh was discolored, almost dark purple, and the mark of discoloration was about five or six to eight inches broad, involving the whole side of the thigh and hip. There was also some injury, rather obscure injury, to the hip joint—probably a strain of the ligaments of the joint. Of that I could not be certain. I presume it was a strain of the ligaments of the joint.

A. The left joint.

Q. What was the extent of the fracture of the ribs, Doctor? Did you examine for that?

A. There was injury to the lung, followed by spitting of blood.

Q. Which lung was that?

A. Well, I presume it was from the left lung. We could not tell from examination, but undoubtedly it was from the left lung.

Q. To what extent was the spitting of blood?

A. Not very much. It stopped after a few days—two or three days, as I remember.

Q. What was the nature of the fracture of the left arm that you have termed the humerus?

A. It was what we call a simple fracture, that is, straight, direct, without complication. The bone is simply broken. The skin was not pierced and the bone was not shattered.

Q. What was the nature of the fracture of the radius of the left arm near the wrist?

A. That was close to the joint, probably involving the joint. This end of the bone right at the joint was broken. That was a more difficult fracture to handle, because it is a pretty small piece of bone to manipulate. It was difficult to do much with it.

Q. And did it also involve the process of the joint?

A. You mean the styloid process?

Q. Yes.

A. It probably started about the base of that; possibly took off just about—yes, came just about through the base of the styloid process.

Q. And what was the nature of the injury to the left hip?

A. Just as I have stated, the severe contusion and probably strains of the ligaments.

Q. Did you notice at the time as to whether or not he had any sensibility or numbness of feeling in the hip and left leg?

A. At that time when he came in?

Q. At that or any other time while you were treat-

ing him?

A. Of course, at that time the sensibility was undoubtedly very much impaired. The hip was blue. I don't recall afterwards. I am not sure whether I tested afterwards for sensibility by pricking with a pin or not. I have an indistinct recollection, but I would not be sure of that.

Q. What was the condition of the left side of his face, Doctor, at the time you first saw him?

A. It was scratched a little; not very severely; but there were quite a number of small scratches on his face.

Q. Was there any bruising of it, or contusion, that you recall?

A. I don't recall any contusion.

Q. Did you examine and ascertain what the condition of his right side was at the time?

A. That seemed to be all right.

Q. Now, what kind of treatment did you subject him to, Doctor, and how long was he under your treatment?

A. He was under my treatment until June 9th.

Q. From what time?

A. From March 25th.

Q. And then he was discharged from the hospital, was he?

A. Yes, sir.

Q. Now, where was he during all that time?

A. You mean whether he was in bed or up?

Q. Yes.

A. Well, the first part of the time he was in bed.

I cannot say how long. Probably, I would say, a month; possibly more.

Q. Now, during that time, what was the extent of his suffering, Doctor?

A. Well, at first he suffered from profound shock, and suffered a great deal of pain from this contusion and injury to the lung, and also the fracture of the bone. He was dazed for the first day or two, and when you would speak to him, that is, for the first day, you would have to speak rather loud to attract his attention.

Q. Was he delirious at all, Doctor?

A. He was delirious, yes.

Q. How long did that continue?

A. I think only just for a short time; once or twice at night he was delirious.

Cross Examination.

(Questions by Mr. PLATT:)

With reference, Doctor, to this injury to the radius at the wrist joint, about how long, in ordinary cases, does the stiffness that accompanies and immediately follows the reuniting of the bone at that point generally continue?

Mr. ST. RAYNER: If the Court please, I object to that question as being an expert question. I merely examined the doctor as to the medical facts, your Honor. As I understand, the doctor does not desire to act as a medical expert witness; therefore I only asked him with reference to the medical facts.

COURT: I think this is cross-examination. You may proceed.

A. You want to know how long it takes the stiffness to disappear?

Q. Yes, in ordinary cases.

A. The time is very variable. If the stiffness comes from adhesion in the joint, or if it comes from adhesions of the tendons which play over the joint—in this case the tendons became adherent, and the time varies from two to three months, it may be until eight or ten months; sometimes longer.

Q. But in a break of that kind, in the progress of eight or ten months a normal use of the wrist generally follows, does it not?

A. Yes sir; in an ordinary healthy individual, I should say yes.

Q. As I understand you in answer to direct examination, there was no complaint made of any trouble on the right side of the body? It was confined to the left side?

A. None that I recall.

Q. With reference to the injury to the lung, as I understand you, the spitting of blood disappeared after a few days?

A. Yes.

Q. Do you consider, from your knowledge of the case and treatment of it, that there is any permanent injury to that lung?

A. I do not consider that there was any permanent injury. I have not examined him for some months. I haven't seen him for six or eight months.

Q. You made a subsequent examination, in conjunction with Dr. Wilson, about the last part of June,

did you not?

A. Yes.

Q. Some two or three weeks after he left the hospital—about three weeks?

A. Yes.

Q. Was there any complaint made by the patient with reference to the hearing of his left ear?

A. I don't recall his having complained about that.

Q. Now, with reference to the contusions and discoloration, and so on on the left side, did you detect the existence of any semi-paralysis up and down the left side?

A. No, I didn't see any.

Q. Did you detect any impairment of memory on the part of the patient during the time that you observed him?

A. Well, that was a matter that I could not judge of, as I didn't know what his memory was before.

Q. Well, was there any complaint made to you by him during the time you had him under observation that his memory was affected?

A. I don't recall it.

Q. Now, with reference to his sleeping as the progress of his recovery proceeded, did he make any complaint to you about difficulty in sleeping at night?

A. Well, at first he had to be given something to relieve the pain and make him sleep, and my memory was not clear in the latter part of his stay on that matter; but I see from the nurse's notes, which I looked over yesterday, that I did give him a hypnotic during the latter part of his stay.

Q. On one occasion?

A. One entry is made of it.

Q. So that there is no impression left upon your mind that there was any serious, continuous difficulty with sleeping in the latter part of his convalescence?

A. I don't recall that there was, very serious.

ReDirect Examination.

Q. You haven't seen him since when, Doctor?

A. Since, I think it was the last part of June.

Q. So you don't know how he has suffered in that regard since then?

A. No, I know nothing about that.

Q. But you say that the nurse's notes show that you gave him something towards the latter part of your treatment of him to produce sleep?

A. Yes.

Q. That would naturally indicate that he had been complaining of loss of sleep, would it not?

A. Yes.

Q. And he may have complained a great many times without your knowledge?

A. Might have.

Q. Counsel has asked you about what would generally be the case in ordinary individuals about the stiffening continuing of this wrist joint. How would it be ordinarily, Doctor, with a man of his age—about 58 or 59 years of age?

A. How much?

Q. How would it be ordinarily in a man of his age, or with him?

A. Yes; well, in his case he is a man that I consider prematurely old.

Q. And it would affect him a great deal worse than a younger man, would it not?

A. Certainly.

Q. As to its permanency?

A. Certainly.

Q. You say that there was no detection by you of any semi-paralysis down the left side. Did he complain to you, Doctor, of a numbness of the left side from the hip down the thigh to the knee?

A. I believe he did.

Q. And the locomotion, or the power of locomotion of that left limb might result from a nerve affection, might it not, a shock to the nerve?

A. Well, if it came from a shock to the nerve, you would expect that to disappear after a few months.

Q. But how if from an injury to a nerve, doctor?

A. If he had an injury to a nerve and a destruction of the nerve, why, then the disability might be permanent or might not be.

Q. It would all depend on the circumstances and the nature of the injury to the nerve?

A. It depends on the nerve. A small nerve injured to a short extent would reproduce itself.

Q. Supposing it were to a nerve in the spinal cord, doctor, would that affect the locomotion or the power of locomotion, the use of the left limb?

A. Oh, yes.

Q. It would?

A. Yes.

Q. Very materially?

A. Yes.

Q. And it might be permanent?

A. Yes.

Q. How, in your judgment, Doctor, severe did you consider the shock to his whole system that he had received from the injury?

Mr. PLATT: Of course, this is not redirect examination.

COURT: It is not redirect examination, unless you want to open up your examination in chief.

Mr. St. RAYNER: No, your Honor. I didn't ask the Doctor any expert questions on my direct, your Honor, but counsel did, and he asked him in reference to these matters.

Mr. PLATT: Not the ones you are now interrogating him about.

Mr. ST. RAYNER: He brought out the question. He said he had sustained a very severe shock. Now, I want to know what he means by that shock, whether it is a shock to the nervous system or not.

COURT: Well, he can answer the question with permission of the court, but it is not redirect examination at all. You may answer, Doctor.

A. The shock was very profound. It was necessary to give him strychnine and put hot water bottles in his bed to recover from it. That, of course, was kept up for three or four days.

Recross Examination.

Q. Doctor, counsel has asked you a hypothetical question with reference to an injury to the spinal cord,

or the nerves running therefrom. Did you detect in this case any injury to the spinal column, or spinal cord, or the nerves running therefrom?

A. No, I did not.

Q. Now, you say that this man was—

A. Well, just wait one moment. You said nerves running therefrom. Of course, the terminal nerves distributed to the skin come from that, and naturally with severe contusion the terminal nerves were injured. I didn't suspect any injury to the spinal column or to the main trunks of the nerve.

Q. Now, you say that this man was prematurely old.

A. Apparently so.

Q. You mean by that, that apparently the nature of his occupation or his previous life had prematurely aged him?

A. Well, he looked older than his years would indicate. I don't know what the cause was.

Q. Well, would his expectation of life be as great, being thus prematurely aged, as it would in a normal person of that age?

A. I didn't understand quite.

Q. Would his expectation of life be as long, therefore, being thus prematurely aged as it would be in a normal person of that same age?

A. No, his expectation would not be so great.

Redirect Examination.

Q. You don't know whether his appearance of premature age, Doctor, was produced largely by this injury that he received, or not, do you?

A. I never saw him before the injury.

Q. And you didn't examine, did you, to ascertain whether there was an injury to the nerve of the spinal cord or trunk?

A. Well, if there had been any injury to the nerve of the spinal cord, it would have shown in the muscular action.

Q. That is, if it had been apparent at that time?

A. Yes.

Q. Yes, but it may have been developed since then, may it not, as a result of that injury?

A. Possibly.

(Excused.)

E. F. MONICAL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. ST. RAYNER:

What relation are you, Mr. Monical, to Mr. Monical the plaintiff in this case?

A. I am his son.

Q. How old are you?

A. 31 last September.

Q. What was the condition of your father, physically, at and previous to the time of this accident?

A. Well, he was a strong, healthy man. He was a better man than I am now.

Q. How much did he weigh at the time of this accident?

A. 217 pounds.

Q. Did you ever know of him being confined to his bed, or ill, prior to this accident?

A. Never to his bed, no, that I know of.

Q. Was there anything the matter with him, physically, prior to this accident?

A. Not that I know of.

Q. Was there any defect of his arm, his left arm?

A. No, sir.

Q. His wrist?

A. No, sir.

Q. Of his lungs?

A. No, sir, I think not.

Q. Speak out so that the stenographer will get your answer. Was there any complaint made by him of injury to his right side?

A. Not that I ever heard him say.

Q. Or to his left lung?

A. Not that I heard.

Q. Or his left leg?

A. Not that I know of.

Q. Or his left face?

A. Not that I know of.

Q. After the accident, how long was it before you saw him?

A. I think it was almost two o'clock when I got to the hospital.

Q. On what day, the same day?

A. The same day that he was hurt.

Q. Where was he then?

A. Well, they were bringing him down out of the dressing-room on a stretcher.

Q. Did you go to him and examine him?

A. Not right then. After they had taken him in-

side, when they came out, I went in.

Q. How long after?

A. Oh, 15 or 20 minutes, something like that.

Q. What was his condition then?

A. Well, I couldn't see much of him then. His arm was all in plaster of Paris, and was laying on the outside, like that, and his face was just all I could see, because he was under the cover.

Q. What was the condition of his face then?

A. Well, it was pale like a dead man, and his lips were blue and his eyes were closed.

Q. His eyes closed?

A. At that time.

Q. And was he conscious or unconscious?

Mr. PLATT: I don't want to curtail counsel in his examination, but I don't see what this has to do with it.

COURT: I suppose he is trying to prove the extent of the injury.

Mr. ST. RAYNER: The suffering, too, your Honor.

Q. Was he conscious or unconscious?

A. Well, I don't know. He was laying there—that is all I know. He didn't have nothing to say.

Q. How long did you see him while he was in the hospital? How often?

A. Every night, except about three or four nights, maybe, that I missed in the time.

Q. Did you attend to him at all?

A. I did.

Q. To what extent?

A. Well, every little bit I could, helping him out the hole.

Q. What was the nature of his suffering during the time that he was in the hospital there?

A. Well, it was in his throat, was a whole lot of it, choking down, and he would turn black in the face, and we could not raise him up, because this side was all gone.

Q. Was he in any pain?

A. Well, I guess he was by the noise he made.

Q. What?

A. He certainly was by the noise he made.

Q. What kind of noise did he make?

A. Groaning, moaning.

Q. How long did that continue?

A. Oh, four or five weeks, almost up to the time he left there, to a certain extent he kept it up; he would get delirious.

Q. How long was he delirious?

A. Well, I guess right almost up to the time he left there, within four or five weeks after he went in there.

Q. How often would he manifest delirium during that time?

A. Well, along towards the last, through the day he was fairly well. At night time, after it commenced to get dark, then he commenced to get worse.

Q. Now, what has been his condition since the injury? What have you noticed wrong with him?

A. Well, I have noticed the whole side is wrong.

Q. Which side?

A. The left side.

Q. In what particulars?

A. Well, from this side down to his foot, he don't seem to have any use of at all.

Q. Has he been able to do any work since?

A. No, sir, hasn't done a day's work, nor an hour's work.

Q. Is he able to get around and help himself? To what extent?

A. Well, by the right side. He is strong in the right side. Drags the left along.

Q. How long has that been going on?

A. Ever since he got hurt.

Q. Ever since he got hurt?

A. Yes.

Q. What is his condition now?

A. I don't see that he is a bit better than he was when he came out of the hospital, or not as well—his leg part, the legs.

Q. Do you know anything in reference to the necessity of dressing him or not or assisting him to dress?

A. Yes, I dressed him this morning.

Q. How about generally?

A. Well, of course, I have not been taking care of him so awful much.

Cross Examination.

Questions by Mr. PLATT:

What is your business, Mr. Monical?

A. Glazier.

Q. Where do you live?

A. 2nd and Taylor.

Q. On this side of the river?

A. Yes, sir.

Q. Are you married?

A. No, sir.

Q. Do you board in a boarding-house?

A. Yes, sir.

Q. And what time do you go to work in the morning?

A. Seven o'clock.

Q. What time do you get off at night?

A. 5:30.

Q. And have an hour at noon?

A. An hour at noon, yes, sir.

Q. And your father had been working on the steamer Shaver for about three years prior to this accident, hadn't he?

A. I think it was.

Q. And before that, on the Jones boats?

A. Yes, sir.

Q. Kept his job pretty steady?

A. Yes, sir, he worked.

Q. And the boat was in and out of the river all the time?

A. All the time.

Q. How often did you see him?

A. Well, on an average of once a week; something like that.

Q. You say his general health was pretty good?

A. It was.

Q. Was he sick at all?

A. Oh, headaches, or something like that. I never seen him have the care of a doctor.

Q. Have to lay off at all?

A. Not that I know of.

Q. Now, since he got out of the hospital, he has been over with your brother, has he not, most of the time?

A. No, not all the time; no, not most of the time.

Q. Where has he been?

A. He has been out at Gates Crossing.

Q. How far is that out of the city?

A. Well, that I cannot say.

Q. It is out on the O. W. P.?

A. It is on the O. W. P. line, yes, sir.

Q. And you have had no opportunity to see him except on Sundays, I suppose?

A. Oh, I have been out there, yes, most every Sunday.

Q. But not during the week?

A. No, not—yes, I was out a couple of times during the week.

Q. That is, since last June?

A. Yes.

(Excused.)

WALTER C. MONICAL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. ST. RAYNER:

You are a son of the plaintiff, are you, Captain?

A. Yes, sir.

Q. What is your age?

A. 36.

Q. Are you a married man?

A. Yes, sir.

Q. What business or occupation do you follow?

A. Captain of a river steamer.

Q. How long have you been following that occupation?

A. Well, as a captain, about nine years.

Q. In following the steamboat business?

A. 20 years.

Q. What was the physical condition of your father prior to the time of this accident?

A. Well, he was in as good a physical condition as a man could be, any one.

Q. Did he have anything the matter with him physically?

A. No, sir.

Q. Was he suffering from anything the matter with either his left leg, his left arm, his left side, or his left lung?

A. Since the accident happened?

Q. No, prior to the accident?

A. No, sir.

Q. Did he ever complain anything about an injury to the left side of his face prior to the accident?

A. No, sir.

Q. Or an injury to the right side of his body?

A. No, sir.

Q. Was he able, prior to the accident, to perform

customary labor? If so, what?

A. Yes, sir. Well, he had followed steamboating, and as hard work as there was on the steamboat.

Q. How was he physically?

A. Why, he was as good a man as ever was on a boat.

Q. When did you see him after the accident, first?

A. I saw him in the hospital.

Q. How long after?

A. Just as they had taken him up in the elevator; I went right up after him, just as they got him in the operating room.

Q. Tell the jury what his condition was when you saw him there first.

A. When I came in, he was lying on a stretcher, and they were just taking his coat off, and the sleeve off, and I think they gave him an anesthetic. I don't know what it was, but the nurse was waiting on him, awaiting the arrival of the doctor. When the doctor came, I helped him to set his arm. His arm was broken here.

Q. Which arm?

A. The left arm, right here.

Q. In the upper part of the arm?

A. Yes, sir, upper part. He said also that there was an injury in this wrist. He didn't say anything about it being broken.

Q. How was he—conscious or unconscious at the time you first saw him?

A. Unconscious. He didn't recognize me, so he must have been unconscious.

Q. What was the condition of his face?

A. Well, it seemed to be bruised on this side.

Q. On which side?

A. On the left side.

Q. What was the condition of his leg, his left leg?

A. Well, that was—didn't know whether the hip joint was broken or not. I am not a medical man, but I was taking the doctor's word for it. He didn't know whether it was broken or what. But the whole left side of the leg was plumb black, just ground to a pulp.

Q. How about the left arm?

A. Oh, the left arm was swollen a little, that was all, and broken there. It was just limber, like that, when he took hold of it. He says, "There is a broken bone in there."

Q. Do you know anything about whether he manifested any suffering at that time?

A. Undoubtedly did.

Q. To what extent?

A. Well, now, I have never suffered any myself, and I have never followed the profession in the hospital as a nurse, or anything of the kind, but I don't think any one could suffer any more.

Mr. PLATT: Is this the time he was unconscious?

Mr. ST. RAYNER: At any time that he saw him in the hospital.

Q. How long did you see him in the hospital, Captain?

A. Well, I staid by his bedside for about three

weeks, a little over three weeks, most a month.

Q. And how was his suffering during those three weeks?

A. Well, if moaning and anything of that kind had effect on it, why, he must have been suffering at all times.

Q. Did you notice, during any portion of that time, whether he was delirious or not?

A. Practically all the time. He would get off and go to steamboating, and then he would be off on the street somewhere else, talking all kind of wild talk. I suppose you call that delirious.

Q. Didn't know what he was talking about? What is his condition since then and now?

A. Well, physically, he is practically a wreck.

Q. In what regard?

A. Well, his left side is practically useless to him, except that it is just the same as a wooden peg on the leg. He can stand up on it, and hold it; that is all; or drag it after him.

Q. How about his left arm?

A. Well, that is useless to him.

Q. And his left wrist?

A. Well, that is impaired and stiff. He cannot move it. No action to the wrist.

Q. Is he able to use that for the purpose of assisting himself, or cutting his food, or anything of that kind?

A. No, sir. I have not taken particular notice of him. I haven't noticed anything of that kind. He just simply says he cannot use it—it is impossible to

use it.

Q. You have observed him a great deal, have you?

A. While I was at home, yes.

Q. Where has he been staying lately?

A. Since about Thanksgiving he has been staying out at Gates Crossing a portion of the time.

Q. And prior to that time whom was he staying with?

A. Staying at my house.

Q. For how long?

A. Some time in June up to November.

Q. Up to what time?

A. Well, I don't know really just what time he went out in the country, but it was in November, I think.

Q. From June until November?

A. Yes, that he was at my house. Of course, there was times when we would go out on a visit, something of that kind, take him out for fresh air.

Q. Have you noticed any complaints made by him in regard to his lung?

A. Complained a great deal of it.

Q. Complained a great deal about what?

A. About a pain in his left lung, and he couldn't get his breath well; he couldn't take a full breath; if he took a full breath, it would pain him all the time.

Q. Do you know anything about him spitting anything?

A. Well, when we were in the hospital, I know that he was spitting blood up to the time I left there,

and then afterward, I noticed at the house different times that he has.

Q. Have you seen him spiting blood lately?

A. Well, I haven't been with him since he was out in the country, to any extent.

Cross Examination.

Questions by Mr. PLATT:

Are you married, Captain?

A. Yes, sir.

Q. And how much of a family have you?

A. I have a wife.

Q. Any children?

A. No, sir.

Q. How long have you lived out there on the East Side, where you are now living?

A. Now? About 12 or 13 years.

Q. And your father has been working at steam-boating as a watchman during the last 10 or 12 years, has he?

A. Well, not the last 10 or 12 years, not as a watchman, but he has been firing, or was firing; but he has been watching for me three years, and between two and three years prior to that watching for Jones. That is the last five years, such a matter. I haven't got the exact dates, you know.

Q. He was acting as a watchman on the steamer of which you were captain?

A. Yes, sir.

Q. What were his duties as a watchman?

A. Well, it is to take care of the boat at nights, call the crews, look out for the fire, handle the head-

line, and help in general, the same as any other laborer aboard the boat.

Q. And prior to the three years on your boat, he was watchman for the Jones people for about two years, you say?

A. Well, I should judge. I didn't keep any dates.

Q. Prior to that time he was a fireman?

A. He has been in the business, practically nothing else, been in the business for the last twenty years, to my knowledge.

Q. He was acting as a fireman then, was he?

A. Yes.

Q. About how often did you see him prior to the last three years, when he was working for the Jones people?

A. Oh, on an average of once or twice every two or three weeks, about every week, on an average, I would see him once a week.

Q. Now, you have been on the Shaver ever since the accident?

A. Yes, sir. No, sir, not on the Shaver since the accident. I was after I left the hospital—

Q. You were at the hospital as I understood you, about three weeks?

A. I was four weeks out there, and then I have been away outside of the city most of the time.

Q. How long were you away?

A. Well, I went to work again on the Shaver in October, the first day of October. I went there on the 25th of March. I went back in the employ of the company on the first of October.

Q. And between the middle of April and the last of October you were away from the city—out of the State?

A. No, I wasn't out of the State—I was eight miles out here in Multnomah county.

Q. At what place?

A. On the section line road, just outside of the City limits.

Q. Well, a farm, was it?

A. Building a house there part of the time, yes.

Q. How often did you come in?

A. Every night.

Q. You went back and forth?

A. For about three or four weeks, some of the time, I boarded out there.

Q. Three or four weeks when?

A. While I was building the house.

Q. I know, but when?

A. That was in July; the latter part of July to first of September.

Q. And then was it you made your trip away?

A. No, I have been here ever since.

Q. I thought you said you had been out of the State?

A. No, you are mistaken. Out of the city. I didn't say out of the State, sir.

Q. What were you doing between the time you finished up the house and the time you went to work again for the Shaver?

A. Well, I don't know as that concerns you. If I have to answer it, I can answer it.

Mr. PLATT: I would like an answer to that.

Mr. ST. RAYNER: Answer it, Captain.

A. Well, I just completed the house and went to work for the Shaver when it was through with, when I accepted.

Q. I thought you said you were about three weeks building the house?

A. No, I was from the latter part of July until, well, I don't remember exact dates, but it was in September some time, about the 15th. I worked on the fire boat about two weeks before I went to work for the Shaver Company.

Q. Well, why did you object to answering the question before?

A. I thought you asked me from the time that I left the hospital until I started this house.

Q. Well, I will ask you that now. What were you doing then?

A. I was up in Southern Oregon.

Q. Well, you were not doing anything down there you were ashamed of, were you?

A. Not a bit, no sir.

Q. Why did you object to answering the question, then?

A. I didn't know that it concerned you, or me either, as far as that is concerned.

Q. Well, the court will be the judge whether the questions are proper or not.

A. Yes, well—

Mr. ST. RAYNER: I submit there is no materiality.

Mr. PLATT: Of course, there is not. I was trying to find out what was the matter with the witness.

Q. Now, you didn't see your father when you were in Southern Oregon, did you?

A. No. I left here about the 15th of July. Got back about the first of August, or just the latter part of July.

Q. Where was he then?

A. He was at my house.

Q. He stayed here with your wife?

A. Yes, and sister.

Q. And was he there during the time that you were building the house, going back and forth?

A. Yes, sir.

Mr. ST. RAYNER: There is just one question I would like to ask.

COURT: Very well.

Q. Did your father, prior to this accident, show any premature signs of age?

A. No, sir, he was a young man for his age.

(Excused.)

Portland, Oregon, Friday, January 5, 1912, 2 p. m.

Dr. B. L. NORDEN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

What is your profession, Doctor?

A. Physician and Surgeon.

Q. What official position if any do you occupy at the present time?

A. I don't understand.

Q. In the city? What official position, if any?

A. Do I occupy—oh, Coroner of the County.

Q. How long have you resided in Portland?

A. Excepting what time I have been away in study, have lived here all my life—my native city.

Q. How long?

A. All my life. This has always been my residence.

Q. How long have you practiced medicine?

A. Five years.

Q. Did you have occasion to examine the plaintiff, Mr. A. L. Monical?

A. Yes, sir.

Q. In regard to his physical condition, and to ascertain what his present condition is, physically?

A. Yes.

Q. When did you make that examination?

A. On the 16th of December, 1911.

Q. In conjunction with whom?

A. At the same time that Dr. E. J. Labbe was there; we made our examinations separately.

Q. Did you make a thorough examination of him at that time to ascertain what his condition was, so far as his left side is concerned?

A. A thorough superficial—a thorough examination with reference to the condition of his muscles and the frame of his body on both sides, but not with reference to any eye or ear conditions.

Q. Not with reference to the eye or ear?

A. Yes.

Q. But otherwise you did?

A. Yes.

Q. What did you find the condition, Doctor, of his left shoulder—his left shoulder and left arm generally?

A. The upper left shoulder, what is known as the scapula, showed an over-growth of bone, the result of a former fracture at the junction of the upper with the middle third, or what is known as the humerus, or large bone of the arm. The mass of muscles on the shoulder, known as the deltoid muscle, or that mass on the shoulder which gives rotundity to the shoulder, was atrophied or grown smaller as the result of disuse of that joint. In the lower arm, below the elbow, the result of what is known as Colleas fracture was present; a Colleas fracture of the bone was found, a fracture just immediately above the wrist joint, going through the two bones, at any rate there was now the evidence at the wrist joint, with reference to the right hand; no injury below the wrist joint except on account of an old fracture, there is limited motion and his grip is, of course, impaired; he hasn't very much strength in the grip in the left hand.

Q. Did you find whether or not the muscles of the left arm were injured?

A. Yes, quite a difference in the measurements—that is above the elbow.

Q. Did you make an examination of the left leg?

A. Yes.

Q. And ascertain as to that and its condition?

A. Yes.

Q. What did you find?

A. You refer particularly now to that which I found of my own volition, and not what he told me?

Q. Both; both what you found on investigation and your own examination.

Mr. PLATT: I object to anything except the results of his own examination.

Q. Of his own tests, I mean.

Mr. PLATT: The plaintiff may testify as to his view of his condition.

COURT: I suppose he had to make some inquiries as he went along; you may answer, Doctor.

A. One of the first tests applied, of course, was the matter of his gait; and he is very noticeably lame. He has a peculiar gait; throws his left foot rather to the side instead of in front, as he walks; tends to support his left hip with his left hand; the power in the left leg is wanting—at that time has been noticeably diminished; not as strong in the left leg. As to his symptoms present, he complains of a numbness, and a feeling of no feeling, so to speak, throughout his left leg. However, I tested it with needles, and he could tell at all times where the needle was being pressed—not pressed, but simply stuck in the skin, and evidently the leg is not anesthesia, that is in a condition of no feeling, but he complains of a certain numbness and loss of power in the leg. Now, in reference to the joints themselves, there is no absolute joint trouble, but there is loss of power in the muscles of the leg undoubtedly.

COURT: Loss of natural motion of the limb?

A. Impairment, I shouldn't say loss.

Q. What do you attribute that to, Doctor?

A. Of course, in an examination, we always get the history of any recent injury, and I attribute it to an injury, not only to the leg but in all probability to the back, as well.

Q. What portion of the back, Doctor?

A. It necessarily would have to be the nerves, the spine or nerves immediately leading from the spine.

Q. What action do these nerves immediately leading from the spine have upon the left leg—the power of locomotion? Do they impair it?

A. I don't quite understand.

Q. What action do those nerves have physiologically upon the locomotion of the leg?

A. They have the entire control of it.

Q. What if anything did you discover with reference to his lungs?

A. With reference to the lung itself, I would say that I didn't discover anything, except what appeared to be a rather—in the process of breathing, through a stethoscope you can hear the breath sound very plainly, through the instrument. The left side appeared to be—one patch there—the patch could cover perhaps the palm of the hand—an area where the breath sounds were not as clear—impaired—and with reference to the lining of the lungs, or the pleura—that covering which envelops the lungs on each side, and also a duplicate on this wall, over the seventh—as I remember the seventh or eighth rib on the left

side, or about this point (illustrating) there is what we call a friction sound; the friction sound being due to adhesion between the pleura; in a normal lung, as the lungs expand and contract it slides upon the pleura which is upon the wall, and through injury or other cause, inflammation starting there has caused an adhesion, so to speak, so that there is some impairment there, which will be permanent.

Q. That adhesion that you speak of causes a consolidation, does it of the chest wall, or pleura and the lung tissue?

A. I wouldn't call it a consolidation; it is an adhesion, of course, to a certain extent.

Q. So that it makes one mass of the three?

COURT: Those questions are rather leading. The witness is able to demonstrate.

Q. Well, you will tell the jury just what you mean, Doctor, by adhesion of the lung or pleura and chest walls?

A. The pleura, of course, is a very minutely fine membrane or covering of both of the lungs; it covers the lung on one side and then it covers the inner lining of the thorax or chest, which contains the lungs; now the pleura is minutely thin, it isn't a mass. When an inflammation occurs there so that the two pleuras, the one lining the walls of the chest and that lining the outside of the lung adhere, we then have what is known as adhesion. Of course the pleura is densely connected with the walls of the chest on one side, and with the lung on the other, and when the two become adhered, we have adhesion, so there is loss of action,

to a certain extent in the lung on account of loss of play.

JUROR: Then you mean by that that there is a certain movement there, but that that movement—

A. It is impaired.

JUROR: Is there not some liquid there normally, when the action is not impaired?

A. It isn't a matter of liquid; it isn't the same movement; some pull; thicker, and adheres; bound together.

Q. Did you examine his right side, Doctor?

A. His right chest—well, his right side, yes.

Q. What did you ascertain from your investigation of that?

A. My recollection of the right side is that it didn't show anything at all except he winced and had pain over here, but I could find no reason for it; he had pain on the right side of the chest, quite palpable pain, but I couldn't hear any sounds or get anything there that would account for it.

Q. How did you ascertain there was pain there?

A. By pressure directly between the ribs.

Q. Did you examine for a fracture of the rib, Doctor?

A. Yes.

Q. On the left side?

A. Yes.

Q. What did you ascertain?

A. I couldn't find any line of fracture. A fracture in the rib is more difficult to ascertain than any other point, even if it is recent. Of course that has

been some time. I couldn't ascertain any line of fracture.

Q. Why was that you couldn't find it, Doctor?

A. The same in this case as any other; the rib is contained in a sheath, as a general rule—always, I should say—contained in a sheath of periosteum or bone covering, and unless the blow was violent enough to crush in the chest entirely, the rib is always left in a natural splint; the healing of a fracture of the ribs is generally quite clear.

Q. And it may be internal—inside or external?

A. What is it?

Q. And it may be an interior portion of the rib—a fracture of the rib inside or external?

A. No, I think not.

Q. What?

A. I think not. You say the fracture may be internal and not external?

Q. Yes.

A. I think not.

Q. That is I mean anteriorly—on the other side of the rib rather than a fracture of the outside, if the blow is from the outside?

A. I suppose a fracture could result that way, but it would be awful hard to elicit.

Q. Now, from your examination of his left leg, Doctor, what is your opinion as to the permanency and impairment of that limb?

A. Is it proper to qualify that with reference to his age?

Q. With Mr. Monical—so far as he is concerned,

A. Considering the length of time which has elapsed between the accident and my examination—

Q. And his age.

A. —considering the age of the patient, I should say it will be a great deal of a permanent disability.

Q. And what is your opinion too, taking these things into consideration, in reference to his left arm?

A. With reference to his entire left side.

Q. The entire left side; and you have already said—

A. That is from the shoulder down.

Q. From the shoulder down to the wrist, you mean; do you not?

A. No, from the shoulder down through the leg.

Q. Through the leg; and what is your opinion regarding the permanency of the injury to the lung, on account of this adhesion and injury?

Mr. PLATT: Objected to on the ground that the witness has not testified there is any impairment of the lung. He has confined his testimony to the exterior covering of the lung.

COURT: He has testified regarding adhesion; I think that covers.

Mr. PLATT: I thought he presupposed the witness testified the lung was injured.

COURT: I know it is a little irregular, but you may answer the question.

A. I testified with reference to the breathing a lack of breathing sounds on one side which necessarily occur in the lung, on account of that adhesion having grown at that time; there is nothing—no medicine

or no agent that can separate these adhesions, so consequently it would be permanent.

Q. Did you notice whether or not he was suffering from any pain in consequence of these injuries, Doctor? If so, what?

A. Well of course I elicited that from him through examination. He complained of pain; he complained of a great deal of pain in the leg and hip joint particularly, and in asking him to place the point of pain, it was more—the hip joint is here, really, the hip joint at this point here where the leg where the leg bends. All pain, over and above and behind.

Q. What region?

A. What we term the lumbar or sacro-lumbar region.

Q. Of the back?

A. Yes, the lower left angle of the back, just above the buttocks.

Q. Did you ascertain anything in reference to the left side of his face?

A. No, he merely said that he had a peculiar numb feeling on the left side of his face, and that his left ear didn't respond properly, but I didn't ascertain anything except what he told me.

Q. That is subjective?

A. Yes.

Cross Examination.

Questions by Mr. PLATT:

If I understand you correctly, Doctor, you didn't discover that the lung itself had been cased or in-

jured?

A. No.

Q. Simply the enclosure or envelope in which the lung expands, and which covers the inner wall of the thorax?

A. Of course the adhesion of that envelope of the lung impairs the motion of the lung to a certain extent, but as to bruising or laceration of the lung itself, I shall have to answer that question negatively—no.

Q. Now, this enlargement that you speak of at the point of fracture, upon the humerus, that generally accompanies a newly healed simple fracture of this nature, does it not?

A. A newly healed fracture, always, yes.

Q. And that disappears in the progress of time, depending upon the individual case, and the amount of assistance it is rendered, during the reduction of the enlargement, does it not?

A. Yes.

Q. And in normal cases it ultimately—the humerus will become practically normal, will it not?

A. Not always.

Q. That is, in the average case?

A. In the average case, with a young man, with the circulatory conditions such as to take care of those things, yes.

Q. Now, isn't that also true of a Colleas Fracture?

A. The same thing exactly; it is a callose.

Q. Now, with reference to the muscular—the ef-

fect upon the muscular system of these severe accidents, where there is a large amount of discoloration on the outside, and some shrinking as the process of healing goes on, what is the fact with reference to these muscles, as time goes on, and the member is made use of, and massage is employed, about the restoration of a normal condition of things, in the average case?

A. That would differ as applied to different cases and different injuries.

Q. Well, take an injury such as that is, where the patient fell a considerable distance, and these muscles on the shoulder that you speak of, and along the thigh and adjacent thereto—where there was nothing torn away—no lacerations from the outside, actual tearing apart of these different muscles, but simply the effect of the impact or bruise or fall, as time goes on in an average case, isn't it a fact that these muscles grow stronger and have a tendency to resume their normal power and flexion?

A. In an average case, yes, where the individual would be able to use the muscles normally again, otherwise there might be an atrophy from disuse. If he couldn't use the member, naturally the muscles would never regain their tone again.

Q. Take this present case, notwithstanding this patient's age, with moderate use and exercise and the passage of time, won't there be a tendency in this left leg to grow stronger—this left limb to resume more nearly its normal power?

A. Considering the length of time that has elapsed

now, I don't think it ever will resume its normal power. It may. It is possible, I must admit. It may get stronger than it is at the present time, even though nine months has elapsed, but I don't think, in this particular case, considering the patient's age, that he will ever resume normal power with either leg or arm.

Q. Not full normal power, but you do look for improvement?

A. I wouldn't promise to him, as a patient.

Q. Do you see any reason why?

A. First on account—a patient that age, as a rule, doesn't recuperate immediately from injuries of that kind; in the second place, he can't use his arm and leg freely at the present time, and naturally he will tend to rest it, and the less use the more atrophy.

Q. That is, he lacks the spur and initiative of a younger person to help himself?

A. Yes, and in addition the indescribable tone of a young man as well, permits him to get well.

Q. In making use of the needle along the left side, you say the patient responded so as to indicate an action of the nervous system—he knew where the needle was?

A. To indicate his nerves permitted him to appreciate he was being stuck by the needle, and the point where he was being stuck; of course that is only a skin reflex.

Q. Did you discover any paralysis—technical paralysis?

A. Not technical paralysis, no; simply impairment

of function.

Q. Did you discover anything in your examination, Doctor, that would indicate that the patient would not be able to rest at night upon his right side?

A. Well, he told us he couldn't rest at night, of course.

Q. Not what he told you but from your examination of his body.

A. The only thing that would be a palpable explanation of that would be the pressure upon the nerves as a result of his back injury, of course.

Q. That would all effect lying upon the left side, but I asked on the right side.

A. No, it might be left side, or right side, or back. It wouldn't necessarily mean pressure upon those nerves; simply lack of feeling back toward the median line might cause pain. It is, of course, absolutely impossible to determine it objectively.

Q. That is, assuming that he did have trouble, your theory would be it would not be the pressure where he was lying, but some other part?

A. It might or it might not. It would be entirely nerve pain.

Redirect Examination.

Q. When you speak, Doctor, of atrophy of the muscles, what do you mean by that?

A. Absolute lessening of the substance—growing smaller.

Q. Shrinking?

A. Growing smaller in substance and in power, of course.

COURT: Is it possible, Doctor, that the nerves of the leg might be injured without the spinal cord being injured?

A. Yes, the large nerves of the leg themselves might be injured; the large sciatic nerve itself could be injured.

COURT: Would that account for want of normal action of the leg?

A. Not so much in the hip, because the sciatic nerve, the big leg nerve, doesn't supply those muscles which lift the leg, up here, and he doesn't have power to lift this leg as readily as the other, so the suggestion is very strong that the injury must be above this point—the hip joint. That is, the injury to the nerve.

COURT: Does it happen that the action of the leg might be impaired by injury to the muscles of the leg?

A. No, there would have to be more than injury to the muscles of the leg alone.

(Witness excused.)

Dr. E. J. LABBE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

What is your profession, Doctor?

A. Physician and Surgeon.

Q. How long have you been such?

A. I graduated in 1895.

Q. How long have you been such?

A. Since 1898.

Q. You examined the plaintiff at the time that Dr. Norden examined him, did you?

A. I did.

Q. Will you tell the jury what you found to be the condition of his left arm at that time?

A. At the shoulder joint there was quite a decided shrinking of the muscles about the shoulder girdle—the shoulder joint; more or less stiffness in the joint itself, restriction of the motion in almost all directions, that is in front and behind, and carrying the arm out. Below the shoulder joint about midway in the shaft of the large bone of the arm—the upper arm, is quite a decided callose or an enlargement of the bone at that place, showing that there has been a fracture there. Lower down, at the wrist joint—just above the wrist joint—is another evidence of fracture, being the fact that there is a callose at that point; some displacement of the lower fragment of the fracture, and decided restriction of the motion at the wrist, particularly supination, that is turning the hand in this direction, and flexion, which is bending the hand around the arm.

Q. What did you find the condition of the arm as to being atrophied or otherwise?

A. The muscles about the shoulder joint were atrophied, and also the muscles of the arm itself.

Q. What did you find the condition of his left hip—left leg, doctor?

A. The left leg, in appearance it looks very normal, but on examination we find a decided weakness

of all the groups of muscles in the leg, and although there isn't any restriction of motion in the hip, or knee joint or ankle joint—that is the examining physician can bend the knee or hip joint in a perfectly normal manner; the patient, however, cannot do so, on account of the general weakness of the limb. I think that that is due to a injury to the nerves, and probably the spinal cord. The patella reflex, that is by tapping the knee just below the knee pan or patella, he gives a sign of some nerve degeneration on that side, that he didn't have on the other side.

Q. Did you examine his lungs to ascertain if there was any injury to either of those?

A. I did.

Q. What did you find, doctor?

A. On the left side, over about the seventh, eighth or ninth ribs, in the axillary line, that is just below the shoulder, there was a diminished breathing and signs—friction signs of the pleura, which I decided to mean a thickening of the pleura, and an adhesion of the lung pleura to the wall pleura. That is making the lung more or less fixed to the chest wall. This was probably the site of a fracture of the rib at that time.

Q. Could you ascertain where the fracture was, Doctor, by examination?

A. No, only from these signs, I decided that that was the point.

Q. Now, from an examination of his left arm and his left leg and his lung, as you have testified to, taking into consideration his age, and the length of time

since the injury, what, in your opinion, is his condition in regard to these different members, as to the permanency of the impairment of them?

A. As regards the shoulder joint, I think that is permanently injured, although it might show some signs of improvement. I believe that some of the atrophy of the muscles in the arm, is not wholly due to inaction, but is also due to a nerve injury at or near the shoulder joint. The wrist joint I think is as well as it is ever going to be. A fracture at that point is a very hard one to deal with, and it isn't always that you can assure patients a very good wrist joint motion with a fracture as near the joint as that, especially at his age. As regards the weakness in the left leg, that may become a little stronger, although I doubt it.

Q. How about the lungs, Doctor, as to the permanency of the impairment you discovered?

A. That will always be just as it is now.

Q. Did you examine his right hand side to ascertain whether there was anything obvious there?

A. I did.

Q. What did you find, Doctor?

A. I found some sore spots, but as far as I could tell with my examination, or watching Dr. Norden's examination, I could find no organic trouble on that side.

Q. What do you mean by organic trouble, Doctor?

A. I mean as far as I could ascertain all the organs, all the internal organs were in a normal condition under that side, and as far as—and the bones and

muscles, as well.

Q. That is nothing broken?

A. Nothing broken or diseased.

Q. Did you test him for the purpose of ascertaining whether there was pain in that region? And what was the result?

A. Yes. There are painful points along the lower ribs on that side and just under the rib on the right side.

Q. Did you examine the left side of his face, Doctor, to ascertain the condition of that?

A. Why, there isn't any examination that would elicit to a physician satisfactorily the symptoms that he complained of, that is a numbness; if it were complete the physician could satisfy himself as to that, but if it is only partial, he has to take the patient's word for a good deal of it.

Q. That is what you call a condition that is subjective to the patient himself?

A. Yes; it is perfectly possible that it exists, and not a physician could swear to it.

JUROR: To what do you attribute these pains in the right side you speak of?

A. They are due largely to the fall that he had and the injury to his back; they are common with the same sort of nerve injury that he had on the left side, that shows in the leg.

Q. Did you ascertain as to whether or not, Doctor, he manifested any appearance of having suffered any constitutional nervous shock, generally? If so, what?

COURT: Is that alleged in the complaint?

Mr. ST. RAYNER: Yes, your Honor, generally, constitutionally and physically impaired.

Mr. PLATT: Where?

COURT: Do you say it is not there?

Mr. PLATT: I don't think so.

Mr. ST. RAYNER: Page 4: By reason of said injuries his general physical health and constitutional condition, which at all times previous to said injuries were good, have been irreparably impaired.

Mr. PLATT: That isn't the question.

Mr. ST. RAYNER: That is what this covers.

Mr. PLATT: If you will ask the question again.

COURT: Well, I don't know whether that extends to general nervous shock. You might ask the question involved by that specification.

Q. Did you through your examination ascertain, (as a result of the injuries that he has received,) whether or not his general physical health and constitutional condition has been impaired, or not?

A. I should say that it has.

Cross Examination.

Questions by Mr. PLATT:

Now, Doctor, you didn't discover in your examination that the lung itself had been punctured or injured other than in the way you describe with reference to the envelope that encloses it?

A. Yes.

Q. That is all you found?

A. Yes.

Redirect Examination.

Q. Just one question: That time that you examined him being so long after the injury would have prevented you finding that there had been a puncture of the lung, would it not?

A. Yes; you could have quite an injury of the lung and that would leave a scar in the lung, and unless it was quite a large one, you wouldn't get any physical sign of such.

(Witness excused.)

Mrs. ELIZABETH DURLAND, a witness called on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

You are a married lady, Mrs. Durland?

A. Yes, sir.

Q. Where do you reside?

A. Near Gates Crossing.

Q. Are you any relation to Mr. Monical, the plaintiff in this case?

A. No, I am not.

Q. How long have you known him?

A. About seven years.

Q. Has he been residing at your place of late?

A. Yes, he has.

Q. How long?

A. I don't know just how long.

Q. About how long—a month or two months?

A. Well, it has been over a month, I think, or something near that. I don't know just how long but

I think something like that.

Q. Do you know what his physical condition was as to being an able bodied man prior to the time that he met with this accident?

A. Yes, he was a very healthy strong man.

Q. Very healthy strong man?

A. Yes.

Q. Now what has his condition been since he has been residing at your house, as to the use of his left arm and leg?

A. Well, he hasn't been able to use them at all—hardly at all. They are very poor and pain him.

Q. Do you know whether or not he is able to sleep at nights?

A. No, he doesn't rest well at all, at nights.

Q. Do you know whether he suffers from pain or not?

A. Yes, he suffers.

Q. To what extent?

A. A great extent, I will say.

Q. Is he able to use his left hand in feeding himself?

A. No, he uses his right hand.

Q. Putting his clothing on, or anything of that kind?

A. No, his right hand is all he uses.

Q. His right hand is the only one?

A. Yes.

Q. Do you know anything about him having been spitting blood, lately?

A. No, I don't know.

Q. You don't know as to that.

Cross Examination.

Questions by Mr. PLATT:

You say you are no relation to Mr. Monical?

A. No, I am no relative to Mr. Monical.

Q. You are a sister of Captain Monical's wife, are you not?

A. Yes, I am a sister to her.

Q. Now, how far is it from your house over to the station of the O. W. P.?

A. It is a little over a mile.

Q. And since Captain—Mr. Monical has been out at your house some time as I understand it; in November he has walked over to the station, hasn't he, on several occasions?

A. Well, we have taken him in the rig and he has walked back a time or so, but it is just all he can do, and he is very tired when he gets back and can hardly get—

Q. So that when you said that he wasn't able to use his left leg at all, you had forgotten that he had walked that mile-and-a-half, hadn't you?

A. No, I hadn't forgotten it.

Q. How many times has he walked that mile-and-a-half?

A. I don't know; he hadn't walked it many times though, because we went and took him in the rig.

(Witness excused.)

E. S. DURLAND, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

What relation are you to Mrs. Durland who just left the witness stand?

A. Husband.

Q. How long have you known Mr. Monical?

A. Oh, I have known him about seven years.

Q. What kind of a man was he physically prior to the time that he met with this accident?

A. Well, he was a stout man. Stout physical man as long as I have known him.

Q. Was he as large and stout and strong as you are now?

A. Yes, sir, more so.

Q. How has he been since that time?

A. Since his accident?

Q. Yes.

A. Well, he is a cripple; that is all I can say.

Q. He is what?

A. He is a cripple; that is all I can say.

Q. Has he been able to do any work?

A. No, sir. Well, I haven't never seen him do any work.

Q. Is he able to use his left arm or left hand?

A. Not to use to do anything, no.

Q. Is he able to use his left leg in the manner he used to?

A. Oh, no; only to drag along—walk a little; not lift it up, go up a step, or anything like that.

Q. Do you know anything about his suffering pain since he has been at your place?

A. Well, I couldn't say in particular because I am never around the house very much through the day, but at nights; isn't in any position to hear if—

Q. How is it as to whether or not he has been reduced in flesh and size since the time of his injury?

A. Well, he reduced quite a lot, after he got out of the hospital to what he was before he went in.

Q. How much loss of weight has he suffered, do you know, since his injury?

A. Oh, I judge thirty pounds or more.

Q. How much?

A. I should judge thirty pounds or over.

No cross examination.

(Witness excused.)

BESSIE KELSO, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. ST. RAYNER:

Are you any relation to Mr. Monical?

A. No, sir.

Q. Are you any relation to Capt. Monical's son, or his wife?

A. No, sir; a niece to Mrs. Monical.

Q. How long have you known Mr. Monical, the plaintiff in this case?

A. For twelve years.

Q. What kind of a man was he physically?

COURT: Mr. St. Rayner, you have produced more than half a dozen witnesses to that same point as this, as to Mr. Monical's physical condition prior

to this accident, and I think this cumulative evidence is not doing any good, and is encumbering the record.

Mr. ST. RAYNER: Very well, your Honor, but I should like to ask just one question:

Q. You have helped take care of him, have you not?

A. Yes.

Q. Since his injury?

A. Yes, sir.

Q. How has he been in reference to being able to dress himself or taking care of himself?

Q. He is not able to take care of himself without one of us is with him all the time.

Q. How is he with reference to sleeping—ability to sleep?

A. He is very restless and gets up some nights and sits up for hours, and doesn't seem to rest at all some nights.

Q. Do any of you have to sit up and take care of him at nights?

A. No, we don't have to sit up with him but we hear him up; but he doesn't make any fuss or anything like that, but he gets up and walks around, and is kind of nervous, you know.

No cross examination.

(Witness excused.)

(Plaintiff thereupon rested, and the foregoing constitutes all of the evidence introduced for or on behalf of plaintiff, as his case in chief.)

(Defendant thereupon moved the Court for a judgment of non-suit, which motion was read into the

record and is in words, letters, and figures as follows:)

Mr. PLATT: If your Honor please, I desire to move for a non-suit on two grounds: First, on the ground of contributory negligence; it appears from the evidence that the plaintiff and the man that accompanied him, being upon a roadway which was used for the passage of automobile trucks loaded with different classes of merchandise, placed themselves in position, leaning up against the railing bordering this roadway on the north side, near an open broken place in the same, with their backs turned to the direction from which vehicles were coming, and with entire disregard of ordinary and reasonable care for pedestrians upon such a structure and at such a place; and that the proximate cause of the injury was the contributory negligence of the plaintiff himself.

And on the further ground that, associated with that, even if there was negligence on the part of the defendant's servant, that the negligence of the plaintiff was concurrent, and under the doctrine of concurrent negligence in this State, if the contributory negligence of the plaintiff contributed in any way to this accident, he cannot recover for his own negligence.

Court: If his negligence was the proximate cause.

Mr. PLATT: Yes, Now, the second ground of the motion is that this plaintiff proceeds upon the theory of the departure of the servant of the defendant from reasonable and ordinary care, such as should be exercised by the driver of such a vehicle in such a

place. The evidence discloses that this roadway was a private structure, whether it be constructed upon a public street, or a portion of the public street, or whether it is constructed upon private property—it is immaterial. The parties who constructed it constructed it for their own private purpose. The City of Portland exercised then and exercises now no right and domain over it. The parties who constructed it have the right at any time that they see fit, and so claimed in answer to interrogatory, that they can put a gate or close it up; it leads to their premises and to nobody else's premises. Such being the admitted and proven status of the locality, the question then arises as to the relation of the plaintiff and of the defendant to that locality. Now, the complaint charges and the answer admits—the answer pleads and the reply admits that the defendant's servant was going to this locality pursuant to a contractual relation existing between the defendant and the tenant of this structure, the East Side Boiler Works. As such, under the authorities to which I shall call your Honor's attention, he was there by right; I mean not only a naked right arising by reason of failure to refuse permission, but an active right. The plaintiff, on the other hand, was going to these premises not upon any business connected with the owners of these premises or either of them or with any tenant of the owner of the premises, but purely and solely about personal business of his own, therefore the plaintiff was what is known in law as an implied licensee; the defendant and its servants stood in the same relation as

the owner of the property. Such being the legal status of the premises, and of the plaintiff and the defendant, then the question arises as to what is the rule of the court as to what the defendant and its servants owe to the plaintiff. Now, the authorities which I shall cite to your Honor, hold that the duty of the owner of the premises upon which a person has placed himself who is an implied licensee, is simply to refrain from wanton and willful negligence, but he owes no duty of what is known as active vigilance, or what is otherwise denominated as reasonable and ordinary care, unless it be established first, that perceiving the plaintiff in a position of danger, that the defendant and its servant must then use ordinary and reasonable care, and there is no proof in this case that the defendant's servant at any time saw the plaintiff or his companion.

(Citing authorities and argument.)

(The Court thereupon refused defendant's motion for a non-suit, and overruled said motion, to which refusal and ruling the defendant, by its attorneys, thereunto duly excepted, which exception was duly allowed by the Court.)

Thereupon the defendant, to sustain the issues resting upon it, offered testimony as follows:

HARRY H. KELLY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. PLATT:

Where do you reside?

A. Antlers' Hotel.

Q. I mean what city. You are in Portland temporarily, are you not?

A. Yes, sir.

Q. Where is your residence now?

A. At the Antlers Hotel.

Q. I mean where did you come from to be present at this trial?

A. Los Angeles.

Q. And for whom were you working during the month of March, 1911?

A. Pacific Hardware—

Q. Pacific Hardware & Steel Company?

A. —And Steel, yes, sir.

Q. When did you first have anything to do with the driving and management of automobiles or automobile trucks?

A. Well, about five years ago, I guess.

Q. You may state your experience, prior to March, 1911, as a driver of an automobile or automobile trucks.

A. From that time, or before?

Q. Before.

A. Well, I worked for Multripe, in Walla Walla, Washington.

Q. How long did you work for him?

A. I worked for him I guess about a year-and-a-half, altogether.

Q. What was the nature of the automobile you were driving for him?

A. General repair work of all kinds.

Q. And driving cars, too?

A. Yes, sir.

Q. Do any demonstrating?

A. No, I done tune-up work and try-out work.

Q. And who did you work for next?

A. Then I went to work for the Holt people in the same town on road work. I worked for them off and on and during harvest seasons I was running gas engines and combined harvesters; I worked for them about four seasons, I guess, altogether.

Q. Succeeding this first year-an-a-half?

A. Yes, sir.

Q. Who did you work for next?

A. I went to Spokane then and went to work for the Columbia Garage there; I was tune-up man there. I don't know just how long I was there, and I worked different places around the same city.

Q. Driving automobiles?

A. Yes, sir.

Q. And automobile trucks?

A. Automobile trucks, especially at the Columbia Garage.

Q. Where did you next work?

A. Then I went back to Walla Walla, and I was working there for the same man I worked for before, Multripe; from there I came here and went to work for Hess & O'Brien, over on Union Avenue, and was floor-man there at night until I got the situation with the Pacific Hardware & Steel Company.

Q. You say you were tune-up man in Spokane. What is tune-up man?

A. It is general inspector; cars that come in and have had trouble—kind of trouble hunting, in regards to the engine.

Q. And I understood you to say you ran a gasoline engine on combined harvester and reaper about four seasons.

A. Yes, sir, that is about three months at a season.

Q. Now, when you applied for the position at the Pacific Hardware & Steel Company, did you inform the management there of your experience as you have outlined it here?

A. Yes, sir.

Q. Now, the automobile truck that you were driving at the time of this accident, explain to the jury the size and appearance of it.

A. Well, the truck was about a seven-ton truck, I guess; that is, its weight was seven tons; it would haul three tons; was a big truck, high off the ground, and was about nineteen feet, I guess, long, overall, from the engine to the end of the bed.

Q. Did it have a top on it?

A. No, sir, it never had a top at the time.

Q. And how many gears or speeds did it have?

A. It has three.

Q. Do you remember the morning of the 25th of March, 1911, starting out with this truck to make deliveries on the east side of the Willamette River?

A. Yes, sir.

Q. And did you have an order for the East Side Boiler Works?

A. I did.

Q. What did that consist of?

A. Well, it consisted of a plate, and I don't exactly remember whether I had angle-iron for that order or not.

Q. There were some angle-irons on?

A. There were some angle-irons on, yes, sir.

Q. On the truck?

A. On the truck.

Q. Now, did you come across the Morrison Street Bridge?

A. I did.

Q. And turn south at East Water?

A. Yes, sir.

Q. Now, when you came to this roadway leading into the East Side Boiler Works, state to the jury what is the nature of the approach from East Water Street on to the planked roadway at that time.

A. Well, at that time, Water Street was tore up; it was rough. The track extended, I should judge, four or five inches above the ground, and it had a lot of chuck holes in it, and as I turned off Water Street into this here roadway, I dropped from second into low, in order to cross these tracks, because the engine wouldn't pull it; the engine is a light engine for a three ton truck, and I continued in low until I got to where I wanted to turn.

Q. And at the time you started up this roadway, toward the west, you were running on low gear?

A. I was running on low gear, yes, sir.

Q. Now, what is the speed that you can obtain on

the low gear, running on that roadway, under those circumstances?

A. Well, I was going at that time about two-and-a-half miles an hour. The highest speed that can be obtained on that gear was five miles an hour.

Q. That is on that gear?

A. On that gear; on low gear.

Q. Now, Mr. Kelly, tell the jury what you know about this accident; did you see anybody on the roadway ahead of you?

A. Yes, sir.

Q. Where were they?

A. Well, they were above the opening.

Q. You mean west of the opening?

A. Yes, sir.

Q. You mean by "opening," entrance?

A. Entrance to the East Side Boiler Works.

COURT: Do you mean west or east?

Mr. PLATT: West, of the entrance to the East Side Boiler Works.

Q. Was there one or more men?

A. I couldn't say whether one or more; I saw some one coming down there.

Q. Coming toward you?

A. Coming toward me, yes, sir.

Q. Now, what have you to say about the noise the truck was making?

A. Well, it was making considerable noise, because when running on low it makes more noise than ordinary, and it had an open exhaust pipe, about that big around, I guess, and exhausted straight through. (illustrating.)

Q. What sort of a noise does an open exhaust make?

A. Well, I couldn't explain it; you hear an open exhaust coming up the street most any time—going up hill. You have heard an automobile truck; that is the kind of noise it makes.

Q. That is the kind of a noise that it makes?

A. Yes, sir.

Q. Now, did you observe at that time anybody other than this man or more than one man that you saw approaching on the west side of this opening leading into the East Side Boiler Works?

A. No, sir.

Q. And what is the next thing that you knew of this accident?

A. Well, after I glanced up and saw this person coming down the roadway, I began—I dropped my eyes to the roadway, didn't pay any more attention to him; he was coming on the right side of me. When I got opposite the door, where I thought I could make the turn, I swung in.

Q. How close were you running to the north railing as you ran along?

A. Was running as close as I could get without rubbing the railing, and also hitting the planks along side this.

Q. Now, the man was approaching you on the right side? You mean he was on the right side of the roadway, or your left side? That is, he would have passed you on the inside?

A. Yes, he would have passed me on the inside.

Q. Now, you say this car was about 19 feet long?

A. Yes, sir.

Q. Do you know how far these angle-irons extended out beyond?

A. Well, they was from thirty to thirty-one feet.

Q. All told?

A. All told.

Q. So they would project out 12 or 13 feet?

A. Yes, sir.

Q. When did you first know that anybody had been struck by the angle-irons?

A. Well, I didn't know it until I had turned around; after I had stopped and I started to back and I turned around and some-one was hollering; I got off my truck and went down and this captain said to me: "you done that—you done that," and I wasn't aware of the fact then that I had hit any one, and so I went around behind the truck, and a lot of people was running down below, so I looked over the rail, and saw—

Q. That was the first that you knew—

A. That is the first that I knew, yes.

Q. That an accident had happened. Now, this roadway at that point is about twenty feet wide, isn't it?

A. Yes, sir, just about, I guess.

Q. Now, is it possible to turn a nineteen-foot truck, with angle-irons projecting twelve feet out of it into that roadway—into that entrance to the Boiler Works, without backing?

A. No, sir, it is not.

Q. And as you made that turn, about where was the front end of your car, that is the right wheel, for instance? How far from making the entrance were you?

A. Well, the right wheel was about two feet the other side of the board; it hit the bumper about three-thirds of the way.

Q. Did it hit hard or—

A. No, sir, it came very easy against the boards.

Cross Examination.

(Questions by Mr. ST. RAYNER):

How old are you, Mr. Kelly?

A. Twenty-three.

Q. When did you first commence the use of one of these large auto trucks?

A. When did I which?

Q. When did you first commence to use one of these large auto trucks?

A. When I was in Spokane.

Q. Who for?

A. The Columbia Garage.

Q. Now, how long did you use it?

A. Well, I didn't use it exactly any length of time. I used them in running in and out of the garage, and I used them for general purposes around the garage.

Q. For how long?

A. Well, I couldn't say in all; I used them every day as far as that is concerned, while I was there.

Q. You didn't use it for running around the streets and delivering goods, did you?

A. No, sir.

Q. Now, when did you next use one?

A. When I worked for Hess & O'Brien.

Q. How?

A. Working for Hess & O'Brien.

Q. Where?

A. Across on the East Side—Union avenue.

Q. When was that?

A. Last spring.

Q. A large auto truck?

A. Yes, sir.

Q. How long did you use that?

A. Well, I used that all the time I was there. I was there about three weeks, I guess.

Q. Three weeks?

A. Yes, sir.

Q. What did you use it for?

A. Same as I did up there; was general man—tune-up man.

Q. Around the garage?

A. Around the garage, yes.

Q. You didn't use that ever delivering goods around the city?

A. No, sir.

Q. How?

A. No, sir.

Q. Did most of your work, as a mater of fact, inside the garage, didn't you?

A. Yes, sir, except—

Q. As machinist?

A. Generally, except when I took cars out on the road; took cars on the road in order to tune up.

Q. You mean by "car" automobile?

A. Yes, sir, automobiles.

Q. Auto trucks?

A. Auto trucks.

Q. When did you next use an auto truck?

A. Working for the Pacific Hardware.

Q. Working for the Pacific Hardware?

A. Yes, sir.

Q. Now, that is the first time you ever used an auto truck for the purpose of delivering goods about the city?

A. Yes, sir.

Q. That is a fact, isn't it?

A. Yes, sir.

Q. When was that you commenced to work for them?

A. For the Pacific Hardware?

Q. Yes.

A. Why, in March some time.

Q. What time in March?

A. I don't know. I didn't put down the date.

Q. Now, the company knew that was the first time you had ever used one of those auto trucks for delivering goods?

A. Yes, sir.

Q. And the traffic manager knew it at the time you went to work for him?

A. Yes, sir.

Q. That is a fact, isn't it?

A. Yes, sir.

Q. And they knew at the time you were not licensed to act as a chauffeur?

A. They did not, no, sir.

Mr. PLATT: I object as to whether or not they knew.

COURT: It is admitted in the pleadings; I don't think it is necessary.

Mr PLATT: It is immaterial anyway.

Q. You say that this truck that you were using was nineteen feet in length?

A. Yes, sir.

Q. Now, how much in length was the body—the bed of the truck?

A. Fourteen.

Q. Fourteen feet?

A. Yes, sir.

Q. Now, the steel that you had on there, or these angle-irons reached merely to the front of the bed of the truck, did they not?

A. They did not.

Q. Where did they reach?

A. They reached clear through to the front of the engine.

Q. To the front of the engine?

A. Yes, sir, to the front of the engine.

Q. Weren't these angle-irons on the bed of the truck?

A. Yes, sir.

Q. Describe to this jury what was beyond the bed of the truck in front.

A. In front?

Q. Yes.

A. The engine was in front.

Q. The engine?

A. Yes.

Q. Now, what portion of the body of the truck did that cover, in width?

A. Which—the engine?

Q. Yes.

A. It cover about, I should judge, about $4\frac{1}{2}$ feet; the engine is that wide.

Q. And how high was the engine from the bed of the truck?

A. The engine wasn't on the bed of the truck at all.

Q. How high was it above it?

A. Above the bed of the truck?

Q. Yes.

A. Why, about two feet.

Q. About two feet?

A. Yes, sir.

Q. And about how much in width, you say?

A. Which, the engine?

Q. Yes.

A. The engine is about four feet, yes, sir.

Q. Now, how wide was the bed of the truck?

A. Why, the bed of the truck is about, I should judge, about six feet.

Q. About six feet?

A. Yes, sir.

Q. What kind of a truck was it?

A. Wilcox.

Q. Wilcox truck?

A. Yes, sir.

Q. Now, you say that—now, you knew at the time, did you not, that you were operating a truck with angle-irons protruding behind it, the truck and angle-irons about forty-four to forty-six feet in length, did you not?

A. I don't think so, no.

Q. How?

A. No, sir, it wasn't that long.

Q. How long was it?

A. The truck was nineteen feet, and the steel was thirty to thirty-one feet, and the steel projected, the end of it, right to the nose of the engine, so that cut off nineteen feet right there.

Q. You are positive of that, are you?

A. Yes, sir, I am.

Q. And you say that when you were operating your machine toward the west, on that roadway, that you saw a man coming from the west towards you?

A. Yes, sir.

Q. Didn't you see two men?

A. No, sir, I can't say whether I saw two men or one man. I saw some-one coming.

Q. And you say that man was west of the opening to the Boiler Works?

A. Yes, sir.

Q. That is west of the opening that you afterwards attempted to pass through?

A. Yes, sir, on the other side, west of it.

Q. Now, was there anything on that roadway to obstruct your view to the west, as you were operating this truck there?

A. No, sir.

Q. Nothing whatever?

A. No, sir.

Q. Was there anything to prevent you seeing two men standing there?

A. Not at all.

Q. The day was clear, was it?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Did you look to observe whether there were two men there or not?

A. No, sir.

Q. You paid no attention to them?

A. I didn't see any one, no.

Q. How?

A. I didn't see anyone standing along the rail or any other place.

Q. I say you paid no attention to it.

A. No, sir, I didnt'

Q. To whether or not anyone was standin by the rail?

A. No, sir.

Q. You didn't look to see if any one was standing by the rail?

A. No one standing at that time by the rail.

Q. How close did you pass these two men when you attempted to turn into this opening of the Boiler Works?

A. Well, if these two men were standing right there when I turned in there, they would have got their toes run over, because I was hugging the rail.

Q. Then you think they were not standing there, do you?

A. At that time, yes, sir.

Q. The time that you attempted to turn your machine into the opening of the Boiler Works, you think that these men were to the west of the gate opening,

do you?

A. Yes, I think they came in, ; as I turned, they came in towards me.

Q. Well, will you explain to the jury how you struck them.

A. Well, the way I think it happened, as I turned in—I saw some one coming down the plank road, and they must have kept on coming as I came, and as I turned in they was just about opposite where the steel would strike them ; as I turned in, the tseel swung around and caught these two gentlemen.

Q. Now, how far did the steel swing around? Did it reach the railing?

A. Yes, sir.

Q. On the north side of this roadway?

A. Yes, sir.

Q. And did it reach across the railing?

A. Yes, sir.

Q. Did you see where it struck the plank?

A. Yes, sir.

Q. Where was that plank located when you struck it?

A. It was located a little below the door, as far as I can remember.

Q. A little below,—what do you mean, east or west?

A. Towards the east.

Q. Towards the east?

A. Yes, sir.

Q. Did you notice an opening there near where that plank was?

A. Not until I struck—not at that time.

Q. Did you notice where your steel had struck and splintered any of these planks?

A. No, not that they splintered, because I pulled the plank back myself.

Q. How far was it protruding over the railing when you pulled it back?

A. Half way, I guess.

Q. How long was it?

A. About twenty feet.

Q. What size plank was that?

A. About four by twelve.

Q. And was it green material?

A. I couldn't say. I am not a judge of material at all.

Q. Pretty heavy, wasn't it??

A. Yes, sir.

Q. And your machine, that is, its overhang, this iron that you had protruding behind, struck that as you attempted to go into this opening, and knocked it nearly half way over the railing?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Now, your theory is that at that time, these men were at the west of that place?

A. Yes, sir.

Q. Ist that it?

A. Yes, sir.

Q. You want these men to believe that?

A. The men were to the east of the planks.

Q. Was east of the planks?

A. Didn't you just say these planks were to the east of the opening?

A. East of the opening, yes.

Q. Didn't you say a while ago, or did I misunderstand you, that these men were to the west of the opening?

A. No, sir, east of the opening, too.

Q. Then you have made a mistake, then, as I understood you. You mean now, then, that the men were standing to the east of the opening to the Boiler Works, do you??

A. Yes, sir.

Q. Now, how far east?

A. Well, I don't know exactly how far; couldn't say at all. Never measured how far it was.

Q. Now, when you passed them, if they were to the east of the opening, how far were you from them when you passed them?

Mr. PLATT: Witness has testified, if you Honor please, that he didn't see them as he passed them at this point of contact. He only saw them as they were approaching and has been giving his theory of how the accident happened.

COURT: He said he didn't see any man along the railing; he said he saw a man approaching him as he went down, and he gave his theory that these men must have walked in there, or come in while his auto truck was turning.

Mr. PLATT: That doesn't vary much from the the-

ory of the plaintiff. They said they hadn't been there but a moment or two.

Q. Well, where you went to turn into this opening, how far were you from the railing on the north side of the roadway?

A. I was as close as I could get without hitting the planks.

Q. How close? ..

A. Well, about fourteen or sixteen inches.

Q. How close did you pass to these planks?

A. Well, I passed pretty close to them. I don't know. I didn't glance down.

Q. About how much.

COURT: He said fourteen to sixteen inches.

A. That was from the rail, yes, sir.

Q. That was from the rail?

A. Yes, sir, and this plank is twelve inches wide.

Q. They were on the inside of the railing?

A. They were right next to the railing, yes, sir.

JUROR: You say you were going in there on the second gear, you call it?

A. I was going in on low.

JUROR: Two-and-a-half miles an hour, you say?

A. Yes, sir.

JUROR: Was it necessary to go in with power on. Were you using power?

A. I was using power.

JUROR: Up grade?

A. Exactly up grade, no. Level plank road.

JUROR: How short a turn can you make with your

truck? Can you turn at a right angle, in that roadway? In other words, can you run right opposite the door and then make the turn?

A. No, sir, I cannot .

JUROR: How short a turn can you make? How soon have you to turn to get in?

A. Well, about as the end of the truck gets opposite the end of the door, by pulling way out, I can make the turn without any angle-iron on, but you have to go very slow.

JUROR: Did it occur to you that the steel would swing around and strike the railing?

A. Yes, sir, that is one reason I made a big turn and pulled out; in order to stop and back and get another square turn.

JUROR: Did it occur to you in hugging the rail your steel would be more liable to strike in making a swinging turn? Had you turned square, wouldn't it have been easier?

A. No, because I couldn't have made a turn, if I pulled to the centre of the road there.

JUROR: Couldn't you get through the door way on an angle or is it so narrow that you had to go straight through?

A. You could have went through on an angle, but not a right angle; you can go through there on about 45 degrees.

JUROR: You wouldn't have to make a square turn?

A. No, sir, don't have to make a square turn. The door is only sixteen feet wide.

JUROR: How wide is the truck?

A. Over all about 8 feet.

JUROR: Was these planks piled up on the drive one tier of planks or more?

A. One tier, yes, sir.

JUROR: Did you see these planks as you were operating towards them?

A. Yes, sir.

COURT: Did you expect the angle-irons to hit the planks?

A. No, I didn't expect it to hit the palnks.

COURT: You intended to maneuver your machine so the angle-iron would not hit the planks?

A. Well, I didn't expect it to hit the planks, no. I couldn't judge exactly how far it would come out. I knew it would come pretty close to the railing, and I didn't want it to hit the railing, either.

COURT: You were intending to get around without the angle-iron hitting any obstruction there?

A. Yes, sir, and also to keep from hitting the corner as I went in through the door.

JUROR: Had you ever been in there with a truck before?

A. Yes, sir.

JUROR: Did you think of the striking of these irons on the railing and boards close to the doorway, or did you make a faulty curve?

A. No, sir, I didn't make that kind of a curve because I had been in before and knew just how to get in.

JUROR: Do you always miss the door two feet and

run back up?

A. When I had nothing on, yes.

JUROR: Do you remember whether you had, at another time, broken this railing?

A. No, sir.

COURT: You had been in there before?

A. Yes, sir.

Q. How many times had you gone in there prior to this with long angle-iron on?

A. Why, I went in there with long angle-iron on—I can't say, but I made an average of about four trips a week.

Q. How many times had you gone in there with long angle-iron on, thirty or thirty-one feet long, as you say?

A. Well, I had been in there with long angle-iron two or three times.

Q. Before that?

A. Yes, sir, but it wasn't unloaded there.

Q. Where was it unloaded?

A. It was unloaded at the Perfect Concealed Bed on Union avenue—64 Union avenue.

Q. You say this truck was geared in three gears?

A. Yes, sir. Three gears forward and one backward.

Q. Now, what is the limit of the low gear?

A. Five miles an hour.

Q. What is the limit of the second?

A. Well, it will go about twelve—from twelve—just about twelve miles an hour, I should judge.

Q. What is the limit of the third?

A. Why, the third can go thirty miles an hour.

Q. Are you acquainted with Francis Johnson, who works for Kelly-Thorsen & Company?

A. No, am not acquainted with him.

Q. Do you know him?

A. Have seen him. Have delivered goods there several times and seen him.

Q. Did you have a conversation about two or three days after this accident, when you were delivering something at the Kelly-Thorsen place of business?

A. Well, I had a little conversation with him most every time I went there.

Mr. PLATT: If the Court please, I think your Honor ruled that is not a part of the *res gesta*.

COURT: It is not cross examination here either unless you are laying the ground for impeachment.

Mr. ST. RAYNER: That is what it was for, your Honor. Witness has testified he didn't see any one standing at that place. I want to show that he told this man he did see two men.

COURT: Well, you may put the question there as an impeaching question.

Q. (Read)

Mr. PLATT: As I understand this is not for the purpose of binding this defendant by any admission, as a part of the *res gesta*.

COURT: No, merely an impeaching question.

Q. Did you have any conversation with Francis Johnson, two or three days after this accident, at the business house of Fisher-Thorsen & Co.,—Kelly-Thorsen & Co., when you were delivering goods there?

COURT: He has already said he had a conversation.

Q. Did you, at that time, tell him that when you were operating your truck towards the west on that roadway that you saw two men standing there?

A. I did not.

Re-Direct Examination.

Q. Do you remember what you did say to him?

A. He asked me in regard to the accident, and I didn't say very much to him about it at that time.

Q. Now, with reference to this roadway and these four times a week that you had been in there for some little time, had you noticed any pedestrians on this roadway?

A. Not standing along there, I had never, no.

Q. You had seen some walking to and fro?

A. Yes, sir.

Q. Now, with reference to the experience that you had in Spokane, in operating an automobile truck, you say that—as I understand you, that you were tuning up man there?

A. Yes, sir.

Q. Now, with refernece to that work in connection with automobile trucks, what did you do with them?

A. Why, I would take them out according to what kind of trouble they had—whether magneto trouble, carburetter trouble, or engine trouble. Would take them out—would go out on the street with them to find out and while doing so would fix the trouble; whatever it was, if it could be, fix it there, and if I couldn't—if any adjustment, had to bring it inside.

Q. How long were you engaged in that kind of work in Spokane?

A. Why, I was there, I should judge, for two years.

Q. And in going in and out of the garage with these large automobile trucks, did you have to make doorways, these ordinary narrow doorways, that they have in and out of garages?

A. Yes, sir, I had to back the trucks out of their-lines and come through a doorway into the main entrance and from there out into the street.

Q. And had been doing that for two years in Spokane?

A. Yes, sir.

Q. Then you went to work for Hess & O'Brien on the east side?

A. Yes, sir.

Q. And did the same there?

A. Did the same there; two doors there and harder to get in.

JUROR: How long did you continue to work for this company after the accident?

A. Until June 6th.

Q. You are not now employed by the defendant, the Pacific Hardware & Steel Company?

A. No, sir.

Q. And haven't been since?

A. No, sir.

(Witness excused.)

JAMES BROWN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. PLATT):

Mr. Brown, you are a photographer of this city, are you not?

A. Yes.

Q. Did you go over to the elevated roadway running from East Water street out towards Supple's dock, in March last, at the request of my associate, Mr. Fales, to take some photographs?

A. Yes.

Q. I hand you a photograph and ask you if that is one of the photographs that you took at that time?

A. Yes, sir.

Q. And that is from Water street looking west, is it?

A. Shooting down this way, toward the river.

Q. This is west, toward the river. Now I will ask you, Mr. Brown, to look at the one I now hand you, and will ask you if this was taken from the opposite direction?

A. Shooting this way.

Q. Yes, looking toward the east; and I hand you a third one and ask you if that one is taken looking toward the north?

A. That way, yes.

Q. And I hand you another one and ask you if that one is taken immediately beneath the one that I last handed you?

A. Looking down to the ground.

Mr. PLATT: I offer these four photographs in evidence.

Mr. ST. RAYNER: When did you take those photographs, Mr. Brown?

A. I don't remember the date; it is on the book. I could easy find out by telephone down to my wife.

Mr. ST. RAYNER: How long after the accident?

A. Well, I don't know; he called me to make them. I don't know how soon.

Mr PLATT: The next day.

Mr FALES: It was probably two or three days after.

Mr. ST. RAYNER: You don't know as to whether these planks that appear in this photograph were there at the time of the accident?

Mr PLATT: This witness doesn't. We will offer other evidence on that point, to show that they were.

Mr. ST. RAYNER: I object, your Honor, unless they show that these planks were there at the time.

COURT: I understand these were taken two or three days after the accident.

Mr. PLATT: A couple of days after.

COURT: That is some evidence going to show that they were there, and they can call other testimony to show that is the condition that the bridge was in at the time.

Mr. ST. RAYNER: They evidently have changed it from the time of the accident, because there is no rail.

Mr. PLATT: The rail had been put in before we got the photographer there; I don't know who put that in.

COURT: These will be admitted with the understanding that the condition will be shown.

(Thereupon said photographs were received in evidence and marked "Defendant's Exhibits 1, 2, 3, and 4," and are attached hereto and made a part hereof.)

No Cross Examination.

(Witness excused.)

RAYMOND R. WHITNEY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. PLATT):

Mr. Whitney, where do you reside?

A. At Eleventh and Clay streets.

Q. In this city?

A. In this city. .

Q. And what is your business?

A. A surveyor and draftsman.

Q. I will ask you, Mr. Whitney, if you have made a survey and a map of the elevated roadway leading from the west side of East Water street, west out to and including Supple's dock, showing its relation to East Water street, and what would be the centre of East Yamhill street if extended?

A. Yes, sir, I made such a survey.

Q. I now hand you a blue print and ask you if that is the blue print map made by you, and if the blue print was made by you from the tracing?

A. Yes, sir, I made the survey and the map was made under my direction.

Mr. PLATT: We offer this map in evidence, with the measurements.

Mr. ST. RAYNER: This is rather a complicated matter, your Honor.

COURT: Is that roadway in Yamhill street, if extended?

A. Yes.

COURT: On what part?

A. South side.

COURT: That is the south side of the street.

A. The roadway is practically the south curb line of Yamhill street extended, the centre of the roadway; its not quite parallel.

COURT: The roadway extends south of Yamhill street?

A. No, a twelve foot curb on Yamhill street, south; would be twelve feet south from the curb line to the property line; the south edge of the roadway is practically the south line of Yamhill extended.

COURT: That is about half the width of the street?

A. No, the roadway is something like 21 feet wide—20 feet, and eight-tenths.

COURT: How wide is the street?

A. Sixty feet wide.

COURT: So this is about half—a little over one-third?

A. One-third, yes.

Mr. ST. RAYNER: I see no objection to it; the jury will be able to observe it by seeing it better than from a map, I expect.

(Thereupon said blue print was received in evidence

without objection and marked "Defendant's Exhibit 5," and is attached hereto and made a part hereof.)

Q. Now, Mr. Whitney, will you point out to the jury, the width of the entrance to the Boiler Works on this—the scale is too small.

A. It shows at this point here; 16 feet wide; this is west, toward the river.

Q. The entrance is sixteen feet wide. Now what is the width of this roadway from East Water street west line into the Boiler Works?

A. The length of it?

Q. The width of it?

A. 21 feet and nine-tenths.

Q. That entrance that you spoke of, 16 feet wide there, is the entrance through which, going towards the south, leads to the East Side Boiler Works?

A. Yes, sir, it does.

Cross Examination.

(Questions by Mr. ST. RAYNER):

How wide is the roadway from the lower board or railing board on the right side of the road to the other board, or foot board on the left side of the road at the entrance to the Boiler Works?

A. Joists, two, twelve inches apart; a 12 inch board this side, without any casing on the door at all and a twelve inch board on the other side, so just 16 feet in the clear.

Q. Well, a four or five inch railing on the south side?

A. That is on the roadway?

Q. Yes.

A. There is a six inch railing.

Q. What is the distance between the board, the outside of that railing on the north side and the board on the south side of the roadway at the entrance?

A. It is practically 21 feet from the outside railing to the building. There isn't any railing on the south side of the roadway at all; the building runs along there.

Q. I am not asking for outside the railing; I ask inside the railing.

A. There is a six-inch railing and a six-inch guard; that is, you take perpendicular from inside the railing down to the roadway, and a six-inch guard along side the roadway, that would take one foot off the width.

Q. So that it would be less than 20 feet in width?

A. Yes.

JUROR: When did you make this survey?

A. January 3rd.

Re-Direct Examination.

Q. Now, this railing that runs along, Mr. Whitney, on the north side is 4x4 material, is it not?

A. It is 2x4—no 4x4, right on top,—4x6 it is. Six inch wide railing.

Q. Then the coping, that is down next to the plank, that is 4x12, isn't it?

A. Next to the plank, the guard?

Q. The guard.

A. No, it is six inches wide.

Q. 4x12 material fastened on the outside, or 4x6 resting right on top?

A. Resting right on top—I couldn't swear whether

resting on top or not, but six inches wide and sticks up about six inches above the planking of the roadway.

Q. That is what I want, the height of the coping.

A. Yes.

Q. You think about six inches?

A. Six inches.

(Witness excused.)

JACK McDANIELS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FALES):

What is your present business, Mr. McDaniels?

A. I am in Meier & Frank.

Q. Who did you work for prior to that?

A. I worked for the Pacific Hardware & Steel Co.

Q. What time did you go to work for the Pacific Hardware & Steel Co.

A. I think I went to work for the Pacific Hardware & Steel Co. about the latter part of May or the first of June—I think about the fifth of June.

Q. What did you do for them?

A. Drove a Wilcox truck.

Q. Who drove this truck prior to you, do you know, for the company?

A. A man by the name of Kelly.

Q. Will you describe this truck?

A. Why, it was a four-cylinder truck and very long and quite wide. It was about—guess it had about twenty foot bed. About twenty foot along the bed—was something like that, and about six or eight feet wide.

Q. Did it have a top or not?

A. Yes, sir.

Q. Will you state the condition of the truck when it was turned over to you?

A. Why it was in pretty bad condition—and——

Q. Well, did it have an exhaust?

A. No sir; it had an exhaust pipe but no muffler on it.

Q. I mean a muffler?

A. No, sir.

Q. Have you made any deliveries with this particular truck to the East Side Boiler Works?

A. Yes, several.

Q. How many?

A. On an average about four or five times a week.

Q. Will you describe to the jury the method of going into this particular roadway off of Water street and into the doorway?

A. Why, on leaving Water street I generally had to shift into low gear, which is for pulling slow, because it was very narrow there and a dangerous place to get into, and hit the turn there that you had to make just after leaving Water street; that you had to take slow; and with ordinary load there you would have to shift onto low gear. You could do it with intermediate gear, but you were running chances because the place was so narrow; when you put it into high gear—the door went like that (illustrating) you would have to give some speed so she would pull therefore had to shift into low gear and had to take it slow there. A man was running

chances on making anything over four miles an hour there.

Q. What speed will this truck run at on the low gear?

A. Why, it won't exceed over about—I wouldn't say for sure it would go over four miles an hour. I wouldn't say for sure.

Q. That is at—the speed of the low gear?

A. That is about it.

Q. Does this truck make more noise running on low gear than it does on any other?

A. Yes.

Q. And upgrade, it gives more noise?

A. More.

Q. Describe in what way it makes more noise?

A. More tention on the gear.

Q. What different noise does the engine make on low than any other?

A. Considerable faster explosion and a little louder.

Q. Either running on low or high or intermediate, describe the noise that this particular truck makes or did make?

A. Well, now, in pulling on low the explosions were faster because the gears were smaller.

Q. Did you ever drive any other truck?

A. Yes, sir.

Q. Did this particular truck make more noise than the ordinary truck of this size, or less?

A. Considerably so.

Q. What was that due to?

A. Due to the fact that it was out of repair and that there was no muffler on the exhaust pipe; had a wide open fire.

Q. Did you ever have any trouble on account of not having a muffler?

A. Yes, sir, I was ordered by the police department—Officer Simms up in front of Chanslor & Lyon's to have a muffler put on.

Q. Why did they object to the lack of this muffler?

A. Because it made so much noise—caused so much disturbance.

Q. Will you describe to the jury what was necessary for you to do with your engine in order to make the turn into this doorway leading to the East Side Boiler Works?

A. I had to idle the engine and shift off to low gear; couldn't make it any other gear; absolutely couldn't because we had to back up there several times and every time went up there with angle-irons always had to back in—go forward a way and back—make two or three different backings up there before I could make the entrance.

Q. Is it possible to run down that roadway at twelve or fifteen miles an hour and make that turn?

A. Well, I am sure I wouldn't care to do it with that truck because it was almost as wide as the entrance was itself and a man with a truck of the size of that—with lig massive truck like that it would be hairbreadth for him to try a thing like that.

Q. What would happen to you if you did run there, and running hit that doorway—running at that rate of

speed?

Mr. ST. RAYNER: I submit that is not proper.

COURT: I think it is proper.

A. Why, a man when he wants to make a turn, he couldn't possibly make a turn going that fast; he would have to slow down at least. He would just have room to make the turn just about as slow as you could idle the engine down and keep it still going—that is to make the turn.

JUROR: When you make that turn did you figure on letting your right front wheel miss the doorway a couple of feet before backing or did you pull it directly in front?

A. Well, the door stood something—when you made the turn going west like this, then the entrance into a sort of boiler shop there, go past a big furnace there, go due west like that—come down the back you know.

JUROR: Before the doorway?

A. No, no. Just run right up and just about hit corner wise like that and still hug to this side close as you could so to get a better spurt.

JUROR: If you went wide the wheel would have hit the corner?

A. Yes.

JUROR: How much, two feet or three feet?

A. If I went straight ahead, would have run right into that furnace there; the furnace sets right there.

JUROR: I mean when you undertook to go through the door you first pull up and pull a little past so when you back and swing the front wheels to get in front of the door way, it would swing you up in front of the

door?

A. No, you couldn't make that without backing; would hug as close as I could to this side and back up and go ahead again.

JUROR: Then you pulled the front wheels a little past the door, did you—half way—two feet—something. In case here is the door—

A. I would hit it just about—say about here; that much of the truck that would be up against the door.

JUROR: And swing and back the truck?

A. Yes, sir, and would swing the wheels like that; I would dish the wheel like that and back up and sometimes with angle-iron would have to back up maybe fifteen or twenty times backing that way to try to get into the entrance.

JUROR: How much back at a time?

A. About that far (illustrating).

JUROR: And swing again?

A. That is the only way I could do it.

JUROR: Could you drive in there if you didn't have angle-irons on the truck?

A. No, sir.

JUROR: Couldn't get in without backing it any time?

A. Generally had to back pull in front of that furnace and I have come just within a few inches—or just a little bit in front of that furnace.

JUROR: Why should the angle-iron make any difference?

A. Because it will hit the building. Part of the angle-iron sticks out in front of the truck and part of it back.

Cross Examination.

Q. How long after this accident on the 25th of March, 1911, was it when you commenced to operate the truck that you are referring to?

A. If I remember right I went to work for the Pacific Hardware & Steel Co. the 5th day of June.

Q. The 5th of June?

A. Yes, sir.

Q. 1911.

A. Yes, sir.

Q. And this truck that you were operating, do you know whether it was the same truck that Harry Kelly was operating?

A. I know exactly it was, sir.

Q. You know it was?

A. Yes, sir, certain of it.

Q. How do you know that?

A. Because I live right on the same street that the hardware company was on and had known Kelly all the time and saw the truck every day of my life and rode on it several times.

Q. What kind of a top did it have?

A. A great big, high, square top and the front of it had a sort of a cap in it a little bit like that and on over the engine.

Q. How wide was the engine part of it?

A. Of the top?

Q. No, the engine? Where the engine was in front of the truck?

A. The engine was about that wide, sir (illustrating).

Q. How wide was the bed of the truck?

A. In the front?

Q. Front or behind, back of the engine?

A. Back of the engine, the bed of the car, I would say was about six or eight feet.

Q. Six or eight feet?

A. Yes, sir, I wouldn't say for sure, which.

Q. What ton truck was it?

A. If I remember right it was three and a half or four—something like that, I wouldn't say exactly.

Q. You don't know whether the muffler had been removed from it at the time that you commenced to operate it, or not?

A. I know there was no muffler on it when I took the truck.

Q. At the time that you took it?

A. No, sir.

Q.. Would this machine make any noise—as much noise on the intermediate gear as it would on the low gear?

A. Why, at an ordinry speed it would not, but if you went to go any higher speed or pulling on a hard pull, why it would make just according.

Q. Would make less noise on the high gear too, wouldn't it?

A. Yes, less noise on the high gear.

Q. And you would consider while operating that truck with angle-iron thirty or thirty-one feet in length,

that it would be highly dangerous to attempt to run in there, into that gateway, at a rate of speed from twelve to fifteen miles an hour, would you not?

A. Exceedingly so, sir.

Re-Direct Examination.

Q. Could you do it without pushing the building down?

A. You would have to—as I said a man would run chances on killing yourself or someone else around there and breaking your truck up; you couldn't make the entrance, it would be impossible to do it.

Re-Cross Examination.

Q. In operating along there, going towards that gateway, would there be any obstruction or anything to prevent your seeing two men standing on the railing on the right hand side of the road going up?

A. Well, a man has to watch his bearings there so close, watching going through that entrance there right down that dock he wouldn't have much of a chance to look at it.

Q. I mean before reaching there—from the time that you—

A. When I was on the street?

Q. From the time you started on the roadway from Water street, would there be anything to obstruct a view along that roadway so as to prevent you seeing two men leaning against the railing on the north side and a little east of the Boiler Works? As a matter of fact isn't there clear vision along there?

A. I think there is, sir.

Q. And nothing to obstruct the view, so that you could see from one end of that roadway to the other when you make the entrance on Water?

A. I think you could up to the entrance of the boiler shops but I don't know from there because I never paid any attention; but I know as you go in—I generally come across the Hawthorne bridge and come down that way because the streets were so badly torn up along there from Morrison street over, going in that way. I know going in there was sort of a turn right at the entrance leaving the street and a little building setting there if I remember right; a sort of little shanty setting there and that is the reason this sort of turn was built in there in the entrance, if I remember right, sir. I think that is correct.

Q. But, after getting on to this roadway from Water street, there is an unobstructed view, is there not, for three or four hundred feet?

A. Yes, sir, I think so, yes.

Re-Direct Examination.

Q. You say, however, that a man driving a truck would have his hands full and his mind on his business there?

A. He would have to, no matter how good a driver he was in the world; he absolutely wouldn't have no chance to look ahead there at all because he has just so wide a space there to go, and no time to look around any place at all; that is the way I always made the entrance.

Q. How far ahead would the noise of this truck give warning on the elevated road there?

A. From the complaints of people that lived around where I made the road, or traveled back and forth every day, it was four or five blocks; complaints that was turned into the the police department and into the Pacific Hardware & Steel Co.

JUROR: You say this truck had a cover on it?

A. Yes, sir.

JUROR: It didn't reach over the whole truck but just over the engine?

A. Yes, reached over the whole truck.

JUROR: Clear back?

A. Clear back.

COURT: Mr. McDaniels, a truck of that kind, going at the rate of twelve or fifteen miles an hour, after it turned off Water street, could it be stopped readily before striking the entrance to the Boiler Works?

A. It would depend on how heavy the load was, your Honor; that is the way I would always judge; that is the way I judge, by how heavy the load I had on.

COURT: What I was getting at is, how easy would it be to stop a truck of that kind with a load on, it going at the rate of twelve or fifteen miles an hour, after it made the turn off of Water street, going along toward the west. How soon could you stop an engine of that kind or a truck of that kind?

A. In about thirty or thirty-five feet, sir.

Q. Thirty or thirty-five feet?

A. With ordinary sized load that I used to take in

there going at that rate of speed.

Q. Twelve or fifteen miles an hour?

A. That would be a pretty high rate of speed at that place.

COURT: Did you ever go in there at that rate?

A. Absolutely did not; never made more than four miles in my life on the entrance.

JUROR: In shifting gear, don't you have to slow down, or can you shift right over?

A. In shifting forward from low into high, why, after you get used to the motor you don't have to be so very careful about slowing down.

JUROR: In shifting from high to low, don't you pretty near have to stop?

A. Almost to dead still; many times have to stop absolutely dead still because the low gear is so small and it is whirling so fast and the big gear is not going so fast. You almost have to stop your engine dead still.

JUROR: You say you knew this truck when Mr. Kelly operated it?

A. Yes, sir, saw it every day of my life.

JUROR: At the time of the accident?

A. Yes, sir.

JUROR: And did it have a top on it at that time?

A. If I remember right it did.

JUROR: You say you have to slow down to slow, from high to low—shut off the gasoline?

A. No, sir, you take the power of the truck away, the engine still going, but you shift your clutch low and that would take the propelling power away.

JUROR: You would do that in shifting from intermediate to low gear?

A. Yes, sir, put my brake on and shift the clutch, which would release the propelling power of the engine.

JUROR: In doing that, how far would you go before getting the speed so you could change?

A. When I went in there I generally stopped right at the entrance there and shifted into low gear before I went on the dock, because there was sort of a raise there; it would drop and then raise up there.

JUROR: In case you don't stop, how far would your machine proceed, do you think, before your gear would change and the engines be operating and be pulling again, if you released the power, before it again assumed the power?

A. Beg pardon, I didn't understand the question.

JUROR: You must necessarily release all power in shifting the gear?

A. Yes.

JUROR: Then releasing from intermediate or high gear, while the machine is still running it would cover some distance before your power is resumed again on low gear; about how far would the machine run without any power—just drift?

A. I generally just put on my brake, right there.

COURT: Does that stop the machine?

A. Practically stops the machine.

JUROR: You don't have to stop the machine, do you? Isn't it a common custom to go on and let the machine drift a little ways and go on and go forward again

with a different gear?

A. Not with a big truck like that, with a small engine that was in it.

JUROR: It is possible, isn't it?

A. I never run any chances and try it. When I shift from intermediate gear to low, I have to stop the machine.

JUROR: Do you know whether or not it is possible to do that without stopping?

A. I know the gear would have been thrown out because I tried it in making an entrance once before up to Covey's Motor Car Co. in going up grade there to get into the entrance into the garage.

Re-Cross Examination.

Q. In making the turn in that place with long angle-irons protruding behind, you would have to make calculations in reference to the angle-irons behind your truck, would you not?

A. Yes, sir.

Q. In order to know whether you could make the opening or not?

A. And also in front.

Q. And also in front?

A. Yes, sir.

Q. And also to prevent hitting things in the swing of the angle-iron on the right side of the road, wouldn't you?

A. There was generally there in the road—

Q. Supposing, for instance, going this way with your load and over there is the opening on the south

side; now, you have long angle-irons behind here; now, in making that swing going in that opening, you have to make calculations not only on the opening but also as to where those angle-irons will strike behind, do you not, in your sweep?

A. There was never anything there to obstruct it, if I remember right; what I had to look out for incessantly was the angle-irons when hanging over there, of it's striking whatever you call it along the—

Q. Railing?

A. Yes, sir, a sort of raising there, because it was limber and hung down.

Q. But you would have to make calculations in making the turn as to whether you could get into the opening, by taking into account the length of the angle-irons behind the truck?

A. Had to be more careful in front—nothing much behind; that angle-iron was limber and would bend, never had to bother that. In front had to be more careful, because there was a big boiler there.

Q. When you are making the turn, as you have described, the long part of the angle-iron, protruding behind, turns much more rapidly than the front, does it not?

A. Yes, sir.

Q. Now, then, if you have got sixteen foot of an overhang behind of iron, don't you have to make calculations as to how far that will sweep toward the railing on the right hand side of the road in making your turn.

A. I have never made any sort of calculation about

that at all because there was never anything there that would matter, because we paid more attention to things that was valuable, which was in front of the truck, where this iron part protruded and nothing in the back that would matter if it did hit.

Q. But if you were hitting there and two men were standing by the railing and you had sixteen feet protruding behind, you would make calculations in making a turn as to how far that would sweep?

A. Yes.

Q. So as to miss them?

A. Certainly.

JUROR: What are those angle-irons like?

A. Shaped like that. (illustrating) Long limber iron.

JUROR: How thick are they?

A. Different thicknesses and widths. Run from that thickness there to a little bit of a thin thickness; very long and mean to handle, limber.

Q. Do they drag on the ground to catch?

A. Depends on how long it is.

JUROR: Did you ever haul any that did?

A. Yes, sir.

JUROR: You have to get out and hold them back?

A. They generally would slide, that is, slide along the railing and bend, and I wouldn't pay any attention to them at all; they were limber. The way they would generally do when they hit this, maybe they would slide five or six feet right on through. I had to pay atten-

tion to that boiler. There was sort of a big furnace in making the entrance in there.

(Witness excused.)

DOCTOR GEORGE F. WILSON, witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Platt):

Dr. You are engaged in the practice of medicine in this city, and have been, for a great many years?

A. I have.

Q. You may state to the jury if you made an examination, in conjunction with Dr. McGruder, of the plaintiff, A. L. Monical, in the month of June of this last year?

A. I wouldn't be certain of the date. I did make an examination some months ago.

Q. Now, state whether you discovered during that examination any injury to the left lung?

A. No, I did not.

Q. State with reference to the injury to the left arm—the large bone of the upper left arm, what did you find with reference to that?

A. There was evidence of there having been a break through the bone. There was—the center of the shaft of the bone. There was a lump suggesting new bone formation that nature throws out to unite the ends of the bone. I judge the arm had been broken prior to that time.

Q. Based on your experience, Doctor, what have you to say with reference to the passage of time as affecting the reduction of that new formation there so as to reduce that upper arm to its normal condition?

A. Well, I think some of that new bone will be always in evidence. That would not interfere with the movement, however. Where the bones are not absolutely in apposition, but overlap, Nature throws out more new material to unite them and it is great many years before that entirely disappears, that new bone formation, but it does not interfere with the movement.

Q. Now, did you notice a fracture also on the same left arm at the wrist?

A. I did.

Q. And what did you discover with reference to the growth there incident to the knitting of the bone?

A. There had been a fracture of this larger bone just above the joint and one end of the bone, in these cases, is usually driven down into the spungy lower end of the bone, and it was my opinion that the reduction had never been accomplished—that that bone never had been pulled out; as a result there is some deformity and some considerable stiffness of the wrist. The movements of the wrist were impaired and I think of the fingers as well.

Q. In your experience, and what is your opinion as to an improvement in the use of that hand and wrist as time goes on?

A. That improves up to a certain extent; sometimes, and frequently where the reduction is not accomplished,

there is some impairment of movement.

Q. Did you find any thing wrong with the patient's hearing?

A. I don't think I examined that. My attention wasn't called to that.

Q. Now, as to the leg feature, Doctor, what did you discover there—the left leg?

A. I was uncertain what had happened. It seemed to me as if there may have been an injury to this big nerve, sciatic nerve, or possibly some portion of the joint itself; as if the bone had been pushed into its socket violently.

Q. Now, if there was an injury to the sciatic nerve, or to the socket of the hip joint, what, in your opinion, would be the result of the progress of time as to the improvement of the patient?

A. If it were a nerve involvement, ordinarily, they get better; they recover. Sometimes, with a joint injury, a certain amount stiffness persists always.

Mr. ST. RAYNER: I didn't catch your last statement.

A. Where a nerve is bruised that way, ordinarily, full recovery takes place. Where a joint, however, is injured, sometimes there is some impairment of movement persisting for a number of years and possibly always in an elderly person.

Q. Based upon your examination, Doctor, what is your opinion as to whether this patient will recover a reasonable use of both the left arm and the left leg?

A. I should say he would.

Cross Examination.

(Questions by Mr. ST. RAYNER):

When did you examine him, Doctor?

A. Why, I am not certain about the date. It was some time in the early summer, I think.

Q. Some time early in June, was it not?

A. Approximately, I should say that long ago.

Q. And you examined him for the defendant company, did you?

A. I did, yes, sir.

Q. And you examined him with Dr. McGruder?

A. Dr. McGruder was his physician. He had treated him.

Q. Dr. McGruder was handling the case?

A. Yes.

Q. And the plaintiff interposed no objection to your examining him?

A. I think not.

Q. How long were you examining him, Doctor?

A. I presume possibly half an hour.

Q. And you have never seen him since you examined him?

A. No.

Q. And never saw him before?

A. Never did.

Q. At the time that you examined him, you were laboring under the impression that the injury to the hip joint was in the nature of a sub-acute arthritis. Will you explain to the jury what that is, Doctor?

A. The joint is composed of a bone with a round

knob and socket into which this head fits. It is a ball and socket joint. That is held in position by a large membrane called a capsular joint. From the surface of that is secreted this lubricating material. In sub-acute inflammation there is supposed to be some change in this lubricating membrane so it becomes rough and causes some pain and discomfort when the joint is moved.

Q. When that prevails, and especially in a man of his age, he may never recover from it.

A. That is true, he may never.

Q. And you couldn't possibly tell from your examination at that time whether he would be able to recover from that or not, could you?

A. I couldn't. The symptoms were indefinite. I couldn't say positively so.

Q. The symptoms were such it would require considerable time in order for you to determine whether or not there was a permanent injury, were they not?

A. Yes, sir.

Q. And that is also true in regard to the condition that you found his left shoulder, left arm and left wrist, is it not?

A. I can't recall anything wrong with his shoulder except his experience with the arm here. I think he is sure to recover from that absolutely—this injury to the arm here—the middle of the arm.

Q. What you mean is the mere fracture of the humerus?

A. It is the result of a fracture but doesn't interfere

with the use.

Q. You refer, when you say he will recover from that, merely to the fracture of the bone, do you not?

A. Yes.

Q. Not merely to the use of the left arm?

A. I saw no other cause for any impairment of function except the presence of this callous and that shouldn't interfere with the function of motion of the same.

Q. That is, if that were all that is the matter with the arm?

A. Yes, sir.

Q. But it would be different if there were an impairment of the functions of the whole arm, would it not? And especially if there should be atrophy of the deltoid muscle and atrophy of the muscles of the arm from the shoulder to the elbow?

A. That might come from disuse and not from injury. I can't recall an appearance of that kind.

Q. If there should be a gradual atrophy in these muscles, that would indicate there was some reason why the arm was not being used, and that it was injured, would it not, other than the fracture to the humerus?

A. That might be a presumption, yes. Yes, if there was such a condition of atrophy.

Q. The injury that you examined to the wrist was such that it was permanent in its character—you considered, did you not?

A. A permanent injury, yes. Deformity is there and will remain there always.

Q. Did you examine him to ascertain whether or not one of the ribs was fractured?

A. I found no evidence of that and no evidence was present at that time of injury to the lung. I construed it from what we call the history of the case, but I could find no evidence of it.

Q. You did not examine for that?

A. I believe I did, but I am not positive.

Q. You are not certain of that?

A. Am not absolutely positive. He presented no signs, no cough, no rapid breathing, nothing that would suggest an injury to the chest at all.

Q. Did you examine him as to whether he was injured in the back in the lumbar or sacro regions?

A. Yes, we had him stripped, standing on one leg and bending forward.

Q. You noticed he had considerable constriction of the left leg, did you not, at that time?

A. Constriction, what do you mean? I do not quite understand that expression.

Q. I mean restriction of the use of the leg.

A. He was lame, yes, sir, and was lame after he went out on the street, apparently. He was watched. We wished to find out whether that was an affectation or not. He apparently had not forgotten it when he went out on the street.

Q. You watched him on the street to ascertain and verify that?

A. Yes, sir.

Q. And you found that prevailed?

A. Yes, sir.

Q. There would be a great deal more chance against the recovery of such injuries as you examined him for in a man of his years than there would be in a younger man, would there not, Doctor?

A. It takes longer.

Q. You say it takes longer?

A. Longer for recovery to take place, full recovery.

Q. But in a man of his years, he might never recover from that hip joint trouble?

A. Possibly not. I couldn't say.

Q. And from the trouble to his arm and his wrist that you have referred to?

A. In the arm, I would think full recovery ought to take place.

Q. How?

A. To the arm, yes; would think it ought to recover from that.

Q. But you wouldn't think so, would you Doctor, if the arm at this time indicated a worse condition now than it did at the time that you examined it—that he would be likely to recover from it?

A. I would have to see that before I could pronounce on that. I would have to compare what I found on the first examination with what I would find existing now.

Q. What I mean is, if it continued up to this date, it would be more indication of the permanency of it, than at the time you examined him, shortly after he came out of the hospital?

A. Not absolutely. I could go into the question of

litigation but I don't know as I—there is no encouragement for this man to get better from the time I saw him.

Re-Direct Examination.

Q. You didn't discover any condition of atrophy in the muscles of the left shoulder?

A. Couldn't recall that; no, I don't know.

Q. I will ask you, to refresh your recollection, to look at your report, with reference to your examination as to the lung.

A. Shows no result from the broken rib and injury to the lung, except perhaps loss of flesh. This man I believe spat blood and was evidently pretty sick.

Q. So you do remember—I understood you to say you weren't sure you made the examination.

A. Well, it has been my habit always, and I can't recall distinctly that I listened with the stethoscope, but I feel quite sure that I did.

Re-Cross Examination.

Q. You also knew, Doctor, that he was suffering from a fracture of the rib?

A. I was told so.

Q. Injuring the lung and causing spitting of blood at that time?

A. Yes, I was told that by the Doctor.

Re-Direct Examination

Q. Your examination at that time you had him stripped, as I understand you, you had him on the right leg and bending the left leg to see what effect the action had on the knee and on the thigh?

A. The muscles.

Q. The muscles?

A. Yes, sir.

Q. Now, Doctor, you have had a great deal of experience in these cases, have you not?

A. I have examined great many of them.

Q. You are chief surgeon of the Southern Pacific Company?

A. Yes, sir.

Re-Cross Examination.

Q. That report that you say you made at that time, Doctor, that counsel just placed in your hands to refresh your memory, at that time you made a note to the effect that it showed no result from the fractured rib and injury to the lung except loss of flesh.

A. Except perhaps loss of flesh, I think I said.

Q. So that, at that time, you knew the rib had been broken and the lung injured?

A. I had the doctor's statement.

Mr PLATT: That is Dr McGruder?

A. Dr. McGruder, yes.

(Witness excused.)

Whereupon proceedings herein adjourned until 10 a. m., January 6th.

Portland, Oregon, January 6, 1912. 10 A. M.

Mr. PLATT: If the Court please, at this point we desire to put in evidence certified copies, from the office of the auditor of the City of Portland, application of the Willamette & Columbia River Towing Company and Joseph Supple for leave to construct this roadway; and

certified copy of the action of the Executive Board and the Street Committee of the Executive Board thereon.

(Thereupon said certified copy of the application of the Willamette & Columbia River Towing Company and Joseph Supple and said certified copy of the action of the Executive Board and Street Committee thereof were received in evidence, without objection, and marked "Defendant's Exhibit 6" and "Defendant's Exhibit 7," respectively, and are attached hereto and made a part hereof.)

COURT: Do you want to read those, Mr. Platt?

Mr. PLATT: No, I think not.

PALMER L. FALES, Called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. PLATT):

What is your occupation?

. Lawyer.

Q. And what office are you associated in?

A. Platt & Platt.

Q. Attorneys for the defendant?

A. Yes, sir.

Q. I call your attention to defendant's exhibits 1, 2, 3, and 4, being photographs of the premises at which this accident took place, and ask you if these photographs were taken by Mr. Brown, the photographer who identified them, under your direction.

A. They were.

Q. State to the jury about what time you took Mr. Brown there to take these photographs with reference

to the date of this accident?

A. It was two or three days after the accident.

Q. And had you been there prior to the date that you took Mr. Brown there?

A. Yes.

Q. And did you discover any change in any of the surroundings between the time of your first visit and the date of these photographs?

A. No, sir.

Mr. ST. RAYNER: Wait a minute. I desire counsel to confine his question to the time that witness went and first saw the premises. It don't take a minute to change planks, your Honor.

COURT:

Were you there on the date of the accident?

A. I was not.

COURT: Were you there immediately prior?

A. No, sir.

Q. How long subsequent?

A. About two days.

COURT: You may examine as far as he knows the situation.

Mr. PLATT: Of course it is obvious that the best that we can do is to bring it as close to the actual moment of the accident as possible. The jury will have to conclude from the testimony of all the witnesses as to whether there has been any change in the status there. We don't claim that these photographs absolutely bind either party to this suit. We are simply trying to do the best we can under the circumstances.

Mr. ST. RAYNER: The only point I desire to make in regard to these photographs, if the Court please, is on the question of those planks that were on the platform of the roadway.

Mr. PLATT: Well, there doesn't seem to be any dispute between the witnesses on either side as to this tall pile of planking there.

Mr. ST. RAYNER: No, it is the other two planks to the east.

Mr. PLATT: Well, we found them there when we first visited it. Now, beyond that, I cannot say.

Mr. ST. RAYNER: You don't mean to contend that they were there at the time of the accident?

Mr. PLATT: We think so.

Mr. ST. RAYNER: I am not asking you what you think. You don't mean to contend that they were?

Mr. PLATT: We haven't been able to find anybody that knows of their having been put there. That is all.

Q. Now, did you see any difference between this locality at the time that you first visited it and the time that you took Mr. Brown over there to take these photographs?

A. No, sir.

Q. There has been testimony here of Captain Nelson that a portion of this railing was out from about the point where this gentleman is, his attention was called to these photographs, just east of this tall pile of planks. State if you made any examination of that railing, and what you found at the time of your first visit?

A. I simply found that there appeared to be an en-

tirely new piece of railing that had been recently inserted; that is to say, this piece of railing had the appearance of a new board, not weather beaten in any particular.

Q. Did you make inquiry as to whether there had been any change anywhere, of the parties in that neighborhood as to whether there had been any change in the physical relations of this property?

Objected to as hearsay and incompetent.

COURT: That would be hearsay.

Mr. PLATT: I didn't ask him what the answer was. I ask him if he made such inquiry.

COURT: Well, you may answer as far as it goes.

A. Yes.

COURT: The inquiry would be hearsay.

Q. Now, did you discover, from the results of that inquiry that there had been any change?

A. Yes.

Mr. ST. RAYNER: Wait a minute. Objected to as incompetent and hearsay.

COURT: I think that would be hearsay, Mr. Platt.

Mr. PLATT: Of course, your Honor understands, so does counsel, that you are at great disadvantage in these matters. As soon as accidents are reported, they are investigated, and you make the best examination you can to ascertain whether physical conditions have been changed, and I am simply trying to find out whether the witness made such inquiry, and whether he discovered, and addition of this insertion of railing, which was obvious, that there had been any change.

COURT: If he discovered anything on the ground that he could see there, he may answer as to that. What other people told him, I think would be hearsay.

Q. Did you discover, from the physical appearance of the premises, any change other than that that you have referred to—the insertion of a new piece of railing?

A. None other.

Q. This new railing that you speak of starts from where the joint of the railing is just east of the tall plank on exhibit 1, and runs from that point east or west?

A. The new piece begins there and runs west.

COURT: Begins where, Mr. Fales?

A. Begins at this joint. In the photograph there appears to be a joint.

Mr. ST. RAYNER: Will you mark it on the photograph?

COURT: Begins there and runs that way?

A. Yes.

Mr. PLATT: Runs west.

COURT: Let the jury understand that.

Q. At the point marked "X" on defendant's exhibit 1, running west, was where the new piece of railing was inserted?

A. Yes, sir.

Cross Examination.

(Questions by Mr. ST. RAYNER):

When you went there, Mr. Fales, the first time, and say you saw this rail out—

A. I didn't say that I saw it out, Mr. St Raymer.

Q. Oh, you didn't?

A. No. I said that I saw where a new piece had been put in.

Q. Well, how long was that new piece, about.

A. Why, it would simply be a conjecture. I could show you the piece on one of the other photographs—the exact piece. I didn't measure it, Mr. St. Rayner. I would simply be guessing.

Q. Well, I only want your judgment about the length of it?

A. The length of that new piece appears on this.

Mr. PLATT: I think the one Mr. St. Rayner has shows that.

A. Yes, the point marked "X" before referred to.

Q. On defendant's exhibit 1?

A. On defendant's exhibit 1, was one end of the new railing, and the other end was a point marked "O".

Q. That point marked "O" would be toward the west?

A. Toward the west.

Q. Of the point marked "X," would it not?

A. Yes, sir.

Q. And about how long was it?

A. Well, Mr. St. Rayner, it would be only a guess.

Q. Well, guess then.

A. I would say probably 16 or 18 or 20 feet.

Q. Now, that is apparent there on the ground now, is it not?

A. Yes, sir.

Q. Where that railing has been put in?

A. Yes, sir.

Q. So that the jury can see it when they go out?

A. Yes. It also appears on these other photographs,
Mr. St. Rayner.

(Excused.)

H. G. COLTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. PLATT):

Mr. Colton, what is your business?

A. Manager for the Massachusetts Mutual Life Insurance Co.

Q. In the pursuit of your occupation, do you have occasion to make use of, and are you familiar with, what is known as Mortality Tables, giving the prospective life or expectancy of people of various ages?

A. Yes, sir.

Q. Have you with you such a mortality table?

A. Yes, sir.

Q. One that is accepted among men of your craft?

A. Yes, sir.

Q. You may consult the same and state to the jury what is the expectancy of a man 59 years of age?

Mr. ST. RAYNER: Well, before that is done, I would like the witness to show, your Honor, or counsel can bring it out, what Mortality Table it is that this institution is governed by.

COURT: You may tell that.

A. This is an American company, and all American companies are now governed by the American Experi-

ence of Mortality.

Mr. ST. RAYNER: By What?

A. The American Mortality Table.

Mr. ST. RAYNER: Is it known by no other name than that?

A. The American Experience Table of Mortality, is the name of the table.

(Examination by Mr. ST. RAYNER):

Q. And all insurance companies, you say, regulate their life insurance business by that table?

A. Yes, sir.

Q. How long has that been in vogue and accepted, Mr. Colton?

A. A few years ago, befor the American Experience Table of Mortality was computed, the life insurance tables were computed on the Combined Actuaries, which were the English tables, but the American Experience has recently, or of recent years been used.

Q. How long, Mr. Colton?

A. Well, I should say ten years. I am not quite posted.

Q. Is it a printed table?

A. Yes, sir. Yes, it is always in all of the life insurance publications of tables of rates and such books as we use in our business.

Q. And that is a table that estimates the general probability of life?

A. Yes, sir.

Q. Of the average person?

A. Yes, sir.

Q. And doesn't take into account those that are above the average in matter of vitality and constitution?

Mr. PLATT: It seems to me this is cross examination, if your Honor please.

Mr. ST. RAYNER: Perhaps it is a little previous. I have no objection to that, your Honor.

Mr. PLATT: You may answer the question now, Mr. Colton.

Q. The expectancy of life of a person 59 years of age would be 14.74 years.

Cross Examination.

(Questions by Mr. ST. RAYNER):

14 and how much?

A. 14.74 years.

Q. Of what age, you say?

A. Aged 59.

Q. Now, that, as I understand you, is merely the mortality table computation that is estimated of the average person?

A. I couldn't say about whether it is the average person. It is the experience of the last 200 years, or as far as the American statisticians can get.

Q. It is derived from statistics of mortality?

A. Yes, sir.

Q. And it takes into account the whole mass of the people, does it not?

A. Yes, sir.

Q. Therefore it strikes an average in making that estimate, does it not?

A. I couldn't say about that. I presume possibly that such a thing—

Q. You don't mean to say that it is reference to the probability of life of a person who is of vigorous constitution and in excellent health, and a very strong person, do you?

A. Yes, it takes in all people that we can arrive at. Of course, there are a great many people that we cannot get it.

Q. Yes, but you don't understand me, apparently, Mr. Colton. You don't mean to say that that is a table that takes only into account persons of strong constitutional health and vigor, do you? It takes into account all people, does it not, in striking the average?

A. I cannot answer the question as to the methods of the computation of the table by the statisticians. It is the only table that all life insurance companies go by. How it is arrived at, I cannot say.

Q. What I would like to bring out, Mr. Colton, is this: You don't mean to contend in your testimony regarding that mortality table, to say and have this jury believe, that it has reference to the probability of life of a person who is in vigorous health, and perfect in constitution, and from a family who live to a great age, do you?

A. Well, it is a table that we use in our business, and how it is arrived at I do not know.

JUROR: Excuse me. Isn't it taken from the Government statistics?

A. No, sir. The life insurance statistics are not

governmental.

JUROR: It is prepared by the life insurance companies themselves?

A. All the life insurance companies take the record of the past 200 years. I suppose they take the best ways of computing it that they have. I don't know what they are.

Q. Yes, but in computing it, Mr. Colton, they take into account persons of weakly constitution as well as the persons of strong constitution, do they not?

A. I should presume they would.

Q. Yes, that is what I wanted to understand.

(Examination by JUROR):

Q. In taking these statistics, do you wish to have us think that these statistics are taken by the life insurance agents or by whom?

A. The agents would not be able to compute any tables of this kind. They are taken by the most eminent statisticians in the world, and are promulgated and put into the books of all publications.

Q. What I want to know is whether insurance companies arrive at these, or whether some other disinterested person. I naturally conclude the insurance companies would take their own basis and start upon that, and not work much upon the outside. Consequently, in doing that, they would take the ages of the people who have been insured, and, of course, those who have been turned down would not be considered?

A. I think the actuaries of all insurance companies put their tables together, as far as they have experience,

and then compile a general table.

Q. That would be drawn from Insurance companies' tables, and not from other people who are not insured?

A. I think probably it is mostly drawn from the experience of insurance companies.

Q. They necessarily draw from men whom they have insured, and not from some they have turned away as weak and that could not be insured? Isn't that so?

A. I have never gone into the compilation of the tables, but I know that they are the tables that we operate on. It is such a matter that does not enter into our affairs, so we take the tables as they are, and go and use them, and they are printed in our books.

ReCross Examination.

Q. In other words, that table is prepared for the purpose of the companies being governed in the assumption of risks?

A. Yes, sir.

Q. That is the object of the table, is it not?

A. Yes, sir. That is the idea, yes, sir.

Q. Of all persons?

A. Yes, sir.

(Excused.)

W. E. JONES, recalled for the defendant.

Direct Examination.

(Questions by Mr. PLATT):

Mr. Jones, there is a passageway, is there not, an elevated roadway or passageway to the south of the one upon which this accident took place, that is, upon your property?

A. Yes, sir.

Q. About how far south of the joint one owned by yourselves and Mr. Supple is that roadway?

A. About 30 feet.

Q. And it extends from the west line of East Water street, how far towards the river?

A. Well, it extends about 200 feet, till it connects with the dock, and then the dock from there is probably 150 feet more.

Q. Now, where with reference to this last named roadway, which is entirely on your premises, is your commissary warehouse?

A. It is about 20 feet from the street, from Water street; that is, from the north side of this roadway. It is between the two roadways, about 20 feet from Water street.

Q. And where is the doorway leading into this commissary warehouse?

A. It is on the old roadway on the south side of the building.

Q. And how far from the west line of East Water street?

A. About 20 feet.

Q. Now, in getting into that commissary warehouse, you would go from East Water street about 30 feet, as I understand you?

A. Yes, sir.

Q. 20 feet?

A. Well, I believe it is nearer 30 feet than it is 20.

Q. Where is your office?

A. It is about 50 feet from Yamhill street, on Water.

Q. 50 feet south?

A. Yes, sir.

Q. Just along side of this old roadway to the south?

A. Yes, sir.

Q. Now, to get into this commissary warehouse by this new roadway, how far would you have to go from Water street?

A. You would have to go down about 250 feet towards the river and then back.

Q. And then go south through this opening?

A. Yes, sir.

Q. And then go east again?

A. Yes, sir.

Q. About the difference between 30 feet and 250 feet?

A. Yes, sir.

Q. Now, this old roadway, has that ever been closed to people who want to go to the commissary warehouse?

A. No, sir, it is never closed to foot traffic. It was just closed to teams.

Q. Now, to get into that commissary warehouse from your office, how do you go? Supposing you were in your office and wanted to go to the commissary warehouse, how would you proceed?

A. You would go by the old roadway.

Q. Did you ever know of Mr. Monical, the plaintiff here, having a trunk in that commissary warehouse?

A. I never knew it until the last few days, but I believe that he has got a trunk there.

Q. Now, the East Side Boiler Works is a tenant, is it not, of your company?

A. Yes, sir.

Q. And is there any other way for teams delivering material to the East Side Boiler Works to get there except to go west on this joint roadway of your company and Mr. Supple, and turn in through the opening?

A. No, sir.

Q. And is that the practice for teams delivering goods there?

A. Yes, sir.

Q. And how many years have the East Side Boiler Works been having deliveries made to them by means of this joint roadway of Supple and your company?

A. Well, I think it is about three years since we abandoned the old roadway.

Cross Examination.

(Questions by Mr. ST. RAYNER): The south roadway that you have referred to, Mr. Jones, is a private roadway upon your premises exclusively, is it not?

A. Yes, sir.

Re-Direct Examination.

Q. Is it any more private, as far as foot passengers are concerned, than the joint roadway?

A. Well, any more than it is on our own property. We always kept the old roadway locked.

Q. Locked for teams?

A. Yes, sir.

Q. But not locked for foot passengers?

A. Well, we did, we always locked it at night for

everything.

Q. Not in the daytime?

A. No, sir.

JUROR: You have a gate there, haven't you?

A. Yes, sir, we have a gate now. The gate closes all but about four feet of it now, and the gate is stationary now, where it used to be open and shut, and at night we close it and lock it.

Q. And this four feet allows foot passengers to go in and out?

A. Yes, sir.

Q. Just the same as on the joint roadway?

A. Yes, sir.

JUROR: Did you have this gateway four feet open prior to this accident and up to the time of the accident?

A. Yes, sir.

Q. It didn't require any man to open the gate to go through there before, or up to the time?

A. No, sir; ever since we closed it to teams. The gate was a double gate, and we closed one gate and nailed the other one right to the one that is closed, and drew it in to about four feet, just so foot passengers could get through, but teams could not. There has been teams go through there, but for awhile we didn't have the gate nailed, and they would come and open the gate and go through; but we had a notice up that it was closed to teams; but while the roadway is apparently good, we didn't think it was safe enough for the heavy traffic.

Q. How did that notice read?

Q. (Cross) That gateway you refer to is on Water

street, Mr. Jones?

A. Yes, sir.

Q. (Cross) You have a trespass sign on that gateway, haven't you?

A. We have a sign on there. The sign is on there yet partly.

JUROR: The same as it was previously and up to the time of the accident?

A. Yes, sir, part of it is there yet, and I believe there has been part of it broken off. I forget just what it did say.

Re-Cross Examination.

Q. That is a trespass sign—No Trespass?

A. No, it wasn't exactly that. It was a notice that the roadway was unsafe for teams.

Q. How long has that been there, Mr. Jones?

A. The notice?

Q. Yes.

A. About three years, I think. Ever since we closed it.

Q. Is it still there?

A. Yes, sir. There was a team drove through there not over a month ago. Before the street was improved, why, we had a runway for teams, you know, but now the sidewalk is about a foot higher than this old roadway. But about a month ago there was a team drove through there anyhow, opened the gate and drove through there. And so we had the gate nailed. I think the gate is nailed now. But we had the gate swung there so it was pretty hard to open it, but a young fellow op-

ened the gate and drove through there—drove over the sidewalk.

(Excused.)

F. B. JONES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. PLATT):

Captain, you are the head of the Willamette & Columbia River Towing Company, the president of the company?

A. Well, I am the president of the company, yes, sir.

Q. And you have lived in this city a great many years?

A. Yes, sir.

Q. Do you remember the day this accident happened, the 25th of March, 1911?

A. I don't recollect exactly the date. It was about March some time.

Q. You heard about it? You didn't see the accident?

A. I didn't see the accident.

Q. You heard about it afterwards?

A. I heard about it, and saw him a few minutes after it happened.

Q. Now, where were you when you heard about it?

A. Why, I think I was in the office.

Q. And how long had you been there?

A. Oh, I don't know. I hadn't been there, I don't suppose—yes, some time, maybe; I couldn't say exactly. I don't know.

Q. An hour or two?

A. Probably half an hour or so.

Q. (Cross) That is, you were in there about half an hour when you heard of the accident?

A. Sir?

Q. You were in there about half an hour before you heard of the accident??

A. Yes, sir.

Q. (Direct) You heard about it immediately after the accident?

A. Yes, I heard about it right after the accident.

Cross Examination.

(Questions by Mr. ST. RAYNER):

How long after, Mr. Jones?

A. Well, it couldn't have been but a few minutes. The foreman of the shop came up and told me a man was hurt pretty bad, and I went right down to see him.

Q. Do you remebrer what time in the afternoon it was?

Mr. PLATT: He hasn't said it was in the afternoon.

A. Not very far from noon.

Q. Could you tell about how far from noon, Captain?

A. Well, I don't believe I can tell.

Q. Was it one o'clock?

A. I couldn't tell just exactly. I disremember. I wasn't paying much attention.

Q. It may have been one o'clock or after?

A. I knew at the time, but I don't know now.

Q. I say, it may have been one o'clock or after one a little?

A. Well, it might have been. I couldn't say for sure. It might have been.

(The witness was excused and testified no further, and the defendant rested its case.

Plaintiff in rebuttal introduced the following testimony:)

Plaintiff's Rebuttal.

ANDREW FRANCIS JOHNSON, recalled for the plaintiff.

Direct Examination.

(Questions by Mr. ST. RAYNER):

Where do you reside, Mr. Johnson?

A. Where do I live, you mean?

Q. Yes.

A. 1107 East Taylor.

Q. How long have you lived in Portland?

A. About six years

Q. What is your occupation?

A. Shipping clerk.

Q. For whom?

A. Kelly, Thorsen & Co.

Q. And how long have you been such?

A. Oh, very nearly five years.

Q. Have you seen, or do you know Harry Kelly, the chauffeur who testified in this case, at any time?

A. I have.

Q. Did you see him about the second or third day after the accident happened to Mr. Monical, the plaintiff in this case?

A. I did.

Q. Where did you see him?

A. When he was unloading some stuff at the elevator door.

Q. At where?

A. At Kelly, Thorsen & Comapny's place.

Q. Did you have a conversation with him at that time?

A. I did.

Q. I will ask you this: Did you at that time, and in the conversation hear him tell you that when—

Mr. PLATT: I object to that, if the Court please. This is for the purpose of impeachment. The only question that was asked the witness Kelly on cross-examination was whether or not he had a conversation with this witness on the subject of this accident, and he said he did not. Now, if they want to ask this witness whether or not he did have a conversation with reference to this accident, I have no objection to it. But for the purpose of impeachment, it was necessary that the attention of the witness under cross-examination should have been called to the conversation, and he should have been asked whether or not he said certain things. Then it would have been competent to ask this witness whether or not he did say those things. You cannot impeach the witness without having given him a chance to state what the conversation in question was.

Mr. ST. RAYNER: If the Court please, I asked the witness if he did not tell this witness, two or three days afterwards, in the place that this witness has testified to that they had the conversation, that when he was

operating his truck towards the west on the roadway—

Mr. PLATT: I object to this counsel making this statement before the jury, because he did not ask any such question. That is a deliberate misrepresentation of the facts.

Mr. ST. RAYNER I will ask for the reporter to produce it, your Honor, and then I will propound my question.

Mr. PLATT: I have no objection to repeating the question they asked the witness Harry Kelly in the language the question was put. Of course, that is proper.

COURT: Very well.

Mr. ST. RAYNER: I thought you said he didn't testify.

Mr. PLATT: No, I said he didn't testify to the question that you were about to put.

Q. Did Harry Kelly tell you at that time and that place that I have referred to, that when he was operating his truck towards the west on that roadway that he saw two men standing there?

A. He did.

(Excused.)

WILLIAM E. JONES, recalled for the plaintiff

Direct Examination.

(Questions by Mr. ST. RAYNER):

You have been sworn, Captain. I place in your hands defendant's exhibit 1, being a photograph, and ask you to examine that, Captain, and tell the jury whether you know about whether or not those two planks that I mark "B" in pencil were on that roadway at the time

of the accident in question, where they now appear in that photograph?

A. I don't think that those two planks were there. I took particular notice to what was around here after the accident, but I don't believe they were there.

Q. And how long were you there after the accident, the first time?

A. Probably half an hour.

(Excused.)

JOHN E. NELSON, recalled for the plaintiff.

Direct Examination.

(Questions by Mr. ST. RAYNER):

I place in the hand of the witness Defendant's Exhibit 1. Examine that, Captain, and I ask you if those two planks where I have marked the letter "B" on that photograph were at that place at the time that you and Captain Monical were standing there at the time of the accident?

A. They were not.

Cross Examination.

(Questions by Mr. PLATT):

What makes you think they were not?

A. There is where I stood.

Q. You stated in your direct examination that you had your foot on something, one of your feet or both of them?

A. Yes, I had it right here, I had my foot on, there was a smaller piece than this, the same as there on this far end, laying right here; I think it was about a four-inch piece; but those plank were not there.

Q. You mean four inches in thickness?

A. Yes.

Q. And how wide?

A. Well, I should judge about six or eight inches.

Q. These planks are 4x12, aren't they?

A. Well, I think they are, yes. I am not sure.

(Excused.)

Mr. ST. RAYNER: Now, if the Court please, that is our case. And I would respectively move the Court for permission to amend the complaint to conform to the evidence, so as to allege that the roadway in question on the day of this accident was a public roadway in the City of Portland.

COURT: The facts don't show that.

Mr. ST. RAYNER: A public roadway, your Honor.

COURT: Well, the evidence doesn't show that it is a public roadway. It shows that the roadway was constructed in there by Mr. Supple and Mr. Jones. Mr. Supple started to construct it himself, and got it half way, and Mr. Jones came to his rescue, and constructed the road the rest of the way, and they got permission from the council to construct that roadway, for the purpose of giving access down to the water front.

Mr. ST. RAYNER: Yes, your Honor, but what I desire to show is that it is a roadway constructed over a public street of the city. That is what the evidence shows.

COURT: It is very true that this roadway is constructed over a public street, but it was not kept in repair by the public. It was not in one sense—it is not in real sense a public roadway. I think you have enough

in your pleadings.

Mr. ST. RAYNER: Very well, your Honor.

COURT: To cover the whole case.

Mr. PLATT: If your Honor please, I don't care to argue the matter any further at this time, but I desire the record to show that the defendant moves for a directed verdict in its favor, on the same grounds upon which I moved your Honor for the granting of a non-suit at the close of plaintiff's testimony, which grounds had been theretofore read into the record and reduced to writing by the official reporter at the close of plaintiff's testimony, and, upon the motion of counsel and with the permission of the Court, said grounds for a motion for non-suit were made a part of defendant's motion for a directed verdict, and were as follows:

"First, on the ground of contributory negligence; it appears from the evidence that the plaintiff and the man that accompanied him, being upon a roadway which was used for the passage of automobile trucks loaded with different classes of merchandise, placed themselves in position, leaning up against the railing bordering this roadway on the north side, near an open broken place in the same, with their backs turned to the direction from which vehicles were coming, and with entire disregard of ordinary and reasonable care for pedestrians upon such a structure and at such a place; and that the proximate cause of the injury was the contributory negligence of the plaintiff himself. And on the further ground that, associated with that, even if there was negligence on the part of the defendant's servant,

that the negligence of the plaintiff was concurrent, and under the doctrine of concurrent negligence in this state, if the contributory negligence of the plaintiff contributed in any way to this accident, he cannot recover for his own negligence.

“Now, the second ground of the motion is that this plaintiff proceeds upon the theory of the departure of the servant of the defendant from reasonable and ordinary care, such as should be exercised by the driver of such a vehicle in such a place. The evidence discloses that this roadway was a private structure, whether it be constructed upon a public street, or a portion of the public street, or whether it be constructed upon private property—it is immaterial. The parties who constructed it constructed it for their own private purpose. The City of Portland exercised then and exercises now no right and domain over it. The parties who constructed it have the right at any time that they see fit, and so claimed in answer to interrogatory, that they can put a gate or close it up; it leads to their premises and to nobody else’s premises. Such being the admitted and proven status of the locality, the question then arises as to the relation of the plaintiff and of the defendant to that locality. Now, the complaint charges and the answer admits—the answer pleads and the reply admits that the defendant’s servant was going to this locality pursuant to a contractual relation existing between the defendant and the tenant of this structure, the East Side Boiler Works. As such, under the authorities to which I shall call your Honor’s attention, he was there by right; I mean not only a naked right arising by reason

of failure to refuse permission, but an active right. The plaintiff, on the other hand, was going to these premises not upon any business connected with the owners of these premises or either of them or with any tenant of the owner of the premises, but purely and solely upon personal business of his own, therefore the plaintiff was what is known in law as an implied licensee; the defendant and its servants stood in the same relation as the owner of the property. Such being the legal status of the premises, and of the plaintiff and the defendant, then the question arises as to what is the rule of the Court as to what the defendant and its servants owe to the plaintiff. Now, the authorities which I shall cite to your Honor, hold that the duty of the owner of the premises upon which a person has placed himself who is an implied licensee, is simply to refrain from wanton and wilful negligence, but he owes no duty of what is known as active vigilance, or what is otherwise denominated as reasonable and ordinary care, unless it be established first, that perceiving the plaintiff in a position of danger, that the defendant and its servant must then use ordinary and reasonable care, and there is no proof in this case that the defendant's servant at any time saw the plaintiff or his companion. * * * *

(Citing authorities and argument.)

COURT: Do you make that motion now?

Mr. PLATT: I make that motion at this point.

COURT: Very well, the Court will overrule it.

Mr. PLATT: And allow us an exception?

COURT: Yes. If you have any instructions they ought to be handed up at this time.

Mr. ST. RAYNER: If the Court please, I have a number of instructions that I desire to submit to the Court, and they are being prepared. They ought to be ready now.

COURT: I suppose this jury will have to go and view the premises now.

Mr. PLATT: Yes, if your Honor please, and I want to make the formal motion at this time, in viewing the premises where the accident took place, the bailiff in charge also conduct them upon the other roadway, which lies south of the Jones commissary, and through the opening towards the East Side Boiler Works, and the location of the office of the Willamette & Columbia River Towing Company, and the doorway entering into the commissary where this alleged trunk was claimed to have been.

Mr. ST. RAYNER: I haven't any objection to the jury viewing all the premises, your Honor. In fact, I desire it.

Mr. PLATT: There has been evidence here that the approach to this north roadway consists of a down and then an up-grade, such that an automoblie truck going in there had to come to a practically full stop to avoid trouble; and there is some snow on the ground. I don't know how good a time it is to go over there, or whether it would be better for the jury to be taken over there on Monday, after this Chinook wind has taken off the snow; and also it is rather disagreeable to take the jury now.

COURT: Yes, it is rather disagreeable now. If the jury doesn't care to go, I won't ask them to go. They might go at half past nine Monday and get back at ten. Whom do you want to go with this jury?

Mr. PLATT: I presume one counsel on each side can go, so that if the jury want to ask any questions of the bailiff we can confer and agree upon the answer.

COURT: Will you go, Mr. St. Rayner?

Mr. ST. RAYNER: Yes, your Honor.

COURT: And you, Mr. Platt?

Mr. PLATT: Yes.

COURT: And I will appoint Mr. Knight to go with this jury. Now, Gentlemen of the Jury, on Monday morning at half past nine you may assemble here, and go with the bailiff across the river to view the premises, In viewing the premises, you will ascertain for yourselves, look over the ground, keep in mind the testimony that has been aduced here, and I presume you may take those pictures along.

Mr. PLATT: That is agreeable to me.

Mr. ST. RAYNER: That is agreeable to me.

Mr. PLATT: Also that survey, if they wish.

COURT: Yes, you may take the photographs and the survey. You may determine for yourselves, and verify, as far as you are able to, the testimony that has been given here. You are going upon the ground for the purpose of elucidating what has been testified to here, and you may determine for yourselves the truth as to the locality and the approach, and this roadway and the surroundings there at that place, which will enable you more certainly to arrive at a satisfactory con-

clusion as to the case. When you have gotten through with your examination, you may return to the courthouse, and the court will be in session at 10 o'clock.

Adjourned until Monday morning at 10 o'clock.

Portland, Oregon, January 8, 1912. 10 A. M.

(The foregoing is all the evidence received on behalf of either party at the trial of this action.)

(Thereupon, the jury were taken under the order of the Court, in charge of the bailiff, to view the premises in question, accompanied by the respective counsel for plaintiff and defendant, and said jury, so accompanied, examined and viewed said premises, to-wit: the premises,, docks, wharves, and warehouse of the Willamette & Columbia River Towing Company, the East Side Boiler Works, Supple's dock and wharf and the roadway in question leading to the same from East Water Street in the City of Portland, Oregon.)

After counsel for the respective parties had addressed the jury, the Court instructed the jury as follows:

[Instructions.]

Gentlemen of the Jury:—

You have heard the testimony in this case, and you have listened to the argument of the counsel, and it now becomes the duty of the Court to instruct you as to the law of the case, for your guidance in determining your verdict under the evidence. I will endeavor, as much as possible to simplify the issues so that you may be able to comprehend them at once, and to go straight to the question of fact which is vital in the premises.

This is an action by Alonzo M. Monical against the

Pacific Hardware & Steel Company, and it is based upon the negligence of the agent or employee of the defendant company. The complaint sets forth that the defendant was negligent, in the first place, in employing Harry Kelly, who was the driver upon the auto-truck that is alleged to have injured the plaintiff. Among other things, it is alleged that the defendant was negligent in employing an unskillful and incompetent servant, and in the way of showing that he was unskillful and incompetent, it is alleged that Kelly had not procured a license from the city to run an auto-truck. There is that element of negligence which is contained in the pleadings. I will say to you, however, that the case has turned more particularly upon the negligence of Kelly himself, for which the defendant company was responsible, because it is admitted that Kelly was the employee and servant of the defendant company. You will therefore give little heed to the allegations as to the negligence of the defendant company in employing an incompetent or negligent servant, and the question of compliance on the part of Kelly with the city ordinance in obtaining a license has but little to do with the case as it has now developed.

It is alleged that Kelly, on the 25th day of March, negligently and unskillfully ran his auto-truck upon a driveway, which has been defined and explained to you, and without giving warning of any kind to the plaintiff, Mr. Monical, the truck having been loaded with angle-iron so that the ends protruded out behind the truck for a distance of some feet—you are to be the judges of the exact distance which it protruded—and by the negligent operation of such truck in that way ran upon and injured

the plaintiff; that is to say, the angle-iron at the time the truck was making the turn, being extended beyond the truck itself, swung around, and the plaintiff, being in the way, was shoved off the elevated roadway and received injuries by having fallen to the ground below, or to the timbers that lay in the way, some 18 or 20 feet. Now, this is the special ground of negligence alleged by the plaintiff in this case: That the defendant's servant Harry Kelly so negligently operated his auto-truck, being loaded with angle-iron, as to run upon and to shove the plaintiff off the elevated highway or driveway, whereby he was injured. That is the allegation of the complaint in short, and it presents the question of negligence to you upon the part of the defendant.

Now, the defendant offers two defenses: One is that this driveway was a mere private way, and that the defendant company was licensed, or had a right, or permission of the owner of the driveway to run its truck upon the driveway, but that the plaintiff was upon the driveway without right; that is to say, he was there without permission of the owner of the driveway, and that, not having permission, he was a mere licensee, and therefore that he had no right to be there; and hence the defendant company had a right to drive its vehicle along the way, and the only liability imposed upon it was that of active vigilance to see that the plaintiff was not run upon or hurt, or if the plaintiff was discovered before the truck came upon him, then it was the duty of Kelly so to manage his truck as not to run him down or injure him. The other defense is simply that, if this road-

way or driveway was something more than a mere private way, or stood in the nature rather of a public way, then the plaintiff was himself negligent in being on the driveway in the position that he was, and was negligent in not observing the approach of the auto-truck, and in not avoiding it and preventing injury to himself.

Those are practically the issues now that are presented in this case.

I will define to you the term negligence, so that you may understand that, before proceeding further to a discussion of the case itself. Negilgence, Gentlemen of the Jury, consists in the doing of an act that an ordinarily prudent and cautious and circumspect man would not have done under the circumstances and conditions, which results in injury to another, or the omission to do some act which an ordinarily prudent and careful man would have done for the prevention of injury to another. This, in effect,, is as near the definition of negligence, as is necessary to give you at this time. It is not essential that I should discuss it further. You must exercise your judgment in determining whether or not the defendant in this case, or Kelly acting for the defendant, was negligent in that way; that is to say, whether or not he did something that a prudent man ought not to have done, or woud not have done, or omitted to do something that a prudent man would have done, in the conduct and driving of his auto-truck on that highway or on that driveway at the time.

Now, the defendant's defense is that the plaintiff himself was guilty of contributory negligence. Contributory negligence is simply negligence on the part of the

plaintiff which negligence contributed to his own injury. That is to say, If the plaintiff in this case was negligent in the way in which he was upon the driveway, and in the manner in which he was standing at the time, and in the non-use of his senses, so that that fact contributed to his own injury, then he could not recover. And I will say to you, Gentlemen of the Jury, that even if the defendant was negligent, through its agent Kelly, in driving its auto-truck, and it appears to you, notwithstanding the defendant's negligence, that the plaintiff himself was negligent, which negligence contributed to his own injury, then the plaintiff could not recover, because that is the negligence which is the proximate cause of the injury; it is nearer to the injury than the negligence of the defendant. In this connection, I will state to you that the mere happening of the event itself is not sufficient to show negligence upon the part of the defendant company, such as will render it liable for the injury that ensued; there must be something else shown beyond the mere happening of the incident. There must be positive negligence shown in order to bind the defendant.

Now, the plaintiff has the burden of proof thrown upon him to show, in the first place, that the defendant was negligent as charged in the complaint. What I mean by burden of proof is, that he must establish his case by a preponderance of the evidence. A preponderance of the evidence is such evidence as will bear the scales of justice down upon one side, be it ever so little; and that much the scales must preponderate upon the side of the plaintiff before he can recover in this case.

If you get beyond that, and find that the defendant was negligent through its agent Kelly, then you will have to determine whether or not the plaintiff himself was negligent contributing to his own injury. And upon this behalf the defendant has the burden of proof, in showing that the plaintiff himself was negligent contributing to his own injury.

With this understanding as to the issues and the burden of proof cast upon the respective parties, we may proceed to a further ascertainment of the law applicable to the case more in detail. Let us first understand the situation. This roadway, as the evidence has disclosed was constructed by Mr. Supple and the Willamette & Columbia River Towing Company. For short, I will refer to that as the Towing Company hereafter. It was constructed leading from Water street to the Water front, a space of probably 200 feet, or more, and it was constructed by private enterprise, and perhaps for private purposes. But it led to a dock or wharf, which was in use by Supple and by the Towing Company, and the use of it must be determined by you hereafter, under the rules that I shall advise you of. The way was probably 21 feet in width, and, as I have said, led from Water street to the water front, where these docks were situated. I will submit to you the question as to whether or not this driveway was a merely private way, used exclusively by the parties constructing it and their licensees, or those having their permission to use it, or whether it is more unrestricted in its use; that is, whether others have used it, or were using it, or the public generally, so as to make of it something more

than a mere private way, or, in other words, something of a public way, or one which the public were accustomed to use and enjoy. I will define to you later the rules pertaining to the rights of persons in the use of and traveling upon a mere private way, as well as those pertaining to a public way or thoroughfare.

Now, the East Side Boiler Works were situated on the south side of this driveway, perhaps 100 feet or more from Water street. It, as you have found from the testimony, was a tenant of the Towing Company, and it had employed the defendant company, or had ordered from the defendant company these angle-irons, and the defendant company was in the act of delivering the angle-irons to the Boiler Works at the time. The Boiler Works, therefore, being a tenant of the Towing Company and having ordered these angle-irons, , gave to the defendant company permission to drive its auto-truck upon this way, in order to deliver the angle-irons to the Boiler Works, so that the act in operating this auto-truck upon this roadway was by right; that is to say, the defendant company had a perfect right from the owners of this roadway to use the roadway for the purposes of delivering these angle-irons. Now, the plaintiff was on the driveway at the time of the accident as a foot man. His purpose in being there, according to his own testimony, was in the course of getting to Jones' warehouse, to procure some clothing from a trunk he had left there. This purpose is questioned by the defendant, and you may determine for yourselves what his real purpose in being there was, and, under further instructions which I will now give you, you may determine the ex-

tent of his right in being there, and the protection vouchsafed to him under the law in the use of the driveway.

It is a duty imposed upon the employer of a driver of an auto-truck of this kind, or of a chauffeur, to exercise ordinary and reasonable care in the selection of an ordinarily skillful and competent driver; but, as I have said to you before, this question has become of small moment in this case, the question turning more particularly upon the acts of the driver himself.

Now, I will say to you generally, a person driving or propelling an auto-truck, automobile, vehicle, or other means of conveyance over a driveway, is bound to the observance for the prevention of injury to others upon the way at the same time, of that degree of ordinary care, skill and precaution as is reasonably commensurate with the danger present or to be reasonably anticipated. Thus, a person propelling an auto-truck upon a public street much used by the public in all forms of travel is required to exercise much greater care, skill and precaution than if he was propelling his truck upon a street or highway but little used for travelers by vehicle and pedestrians. So he would be required to exercise greater care and precaution upon a public highway but little traveled than upon a private way, where persons with vehicles or on foot were not much expected to be found. In the case of persons constructing and having upon their premises a merely private driveway, there is no obligation devolving upon them to keep the same in repair or free from obstruction or defects, in favor of persons using the way without permission of those who

are merely licensees; that is, persons using the way of their own volition and for their own convenience only, and without invitation or inducement in any way on the part of the owners of such private way. I may instance to you what would be a private way so that you may undersand it more readily. If one of you gentlemen owning a farm has opened a gateway across your premises, or has opened a way for your private use only, that would be a merely private way, and persons who would cross through your gateway, or through your open way, that you have opened for your own convenience, without your permission, or persons who might go through there for their own convenience and volition, although you have not refused them the right,—as to these persons, you would be required to exercise the care only not to run them down or hurt them after you have found they are upon the way; that is to say, you are not under any obligation to exercise vigilance to ascertain their presence there, but if you should ascertain their presence there, then you should so conduct yourself as not to injure them. So that this is a merely private way. Now, the owners of such a merely private way further owe no duty of vigilance towards persons found thereon without their permission, or in the capacity of mere licensees, except that the owners shall not wantonly or wilfully injure them, or, if their presence is seasonably discovered, shall exercise reasonable care for their protection.

Now, having defined a private way to you, you will consider in this case whether or not this driveway was a mere private way, for the convenience of Supple and

the Towing Company only, or whether it was something more.

Now, I will instance another case to you. Where a railroad company should have crossing its track a way which, perhaps, began as a merely private way, and which yet has developed into something more, that is to say, persons have begun to cross and continued to cross until they have become accustomed to cross there in numbers, or, to more or less extent in larger numbers, in a case of that kind the railroad company would have to exercise diligence or care and circumspection according to the travel across that way, and if it should turn out that the way was travelled by multitudes of people, then the care that would be imposed upon the railroad company to see that it did no injury would be increased correspondingly.

Now, in this case there has been evidence introduced for the purpose of showing to you that the roadway was used for more than private purposes; notwithstanding the roadway was constructed by Supple and Mr. Jones, or the Towing Company, for their own use and for the use of their dock, that other persons besides themselves and those having business with them have been accustomed to go upon and use this roadway. You will understand that the roadway was constructed over a part of Yamhill street, but that makes no difference in this case, because permission was obtained from the City Council, or the proper committee, for constructing this private way, and it was constructed by private enterprise and so maintained by private enterprise. But you are to determine whether or not it was used for

something more than a private way—whether or not the public generally have become accustomed more or less to use and to be about and upon this way, and to use it in the way of a public highway; and then you will determine to what extent it has been so used. And if you find that it has been used for larger purpose than a mere private way, then that will have a bearing upon your findings as to the negligence in this case.

It is a case, therefore, for you to determine, first, the manner of the use and the extent thereof to which the driveway has been and was subjected, both before and at the time of the accident, and under the instructions I have given you, to determine what reasonable and ordinary care, skill, and precaution should be exacted of persons propelling auto-trucks over and upon the same for the protection of others using the same way, or rather others that might reasonably be expected to be and to be found present upon the same driveway, and especially pedestrians, if any, that might reasonably be expected to be found traveling or loitering thereon. In doing this, you must exercise your judgment as reasonable and prudent men, taking into consideration all the facts and conditions and circumstances that have been developed at the trial of this cause.

If you find that this driveway was something more than a mere private way, that is, one used to a more or less extent by others than the owners and tenants and licensees, or by the public in a more or less general way, and that the plaintiff was rightfully thereon, either by permission or license, or as licensee, or as one of the general public, and the defendant's servant Kelly

was negligent in so propelling his truck, without giving warning or notice of its approach, as to shove the plaintiff off the driveway and injure him, then the defendant would be liable, unless you further find that the plaintiff was himself guilty of negligence which contributed to his own injury.

As to the conduct of the plaintiff while upon this driveway, it was his duty, for his own protection, to use his senses of seeing and hearing. He was required to so deport himself with ordinary and reasonable care, that he would not be injured; that is to say, being upon a driveway, or a public way, or whatever it might be, unless it was merely a private way, to take note of the passage and passage of cars or of trucks, or of vehicles of any kind, and to so conduct himself that he would not be injured. He would not be excusable if he was merely running headlong and heedless upon a way of that kind and was injured. And in this connection, I will give you an instruction which seems to be clear upon the subject, as follows:

I further instruct you that the law presumes that every person will exercise his natural faculties to prevent injury to himself, and if you believe from the evidence that the position occupied by the plaintiff was a dangerous one to occupy, and that plaintiff voluntarily placed himself there, and that the dangers attendant thereto were known or should have been known to plaintiff, it was then incumbent upon the plaintiff to exercise all his natural faculties and diligence commensurate with the dangers of the position, and the failure to exercise

such faculties would be contributory negligence and preclude his recovery.

Then another charge. I further instruct you that if you believe from the evidence that the plaintiff was familiar with the custom of heavily loaded trucks turning into the gateway leading to the East Side Boiler Works, and if you further find that the plaintiff heard or should have heard the approach of the auto-truck, it was then incumbent upon him, in exercising the duty of protecting himself from injury, to determine whether or not this particular truck was to be turned into the East Side Boiler Works, and the failure of the plaintiff to make any effort to determine the fact was contributory negligence, and he cannot recover.

I think this sets forth very clearly the duty of the plaintiff in being upon the driveway at that time, and in the care that he should observe for his own protection. You are therefore to determine first whether the defendant's servant has been negligent. If you find that the defendant's servant has been negligent in the propelling and conduct of his auto-truck upon this driveway, whereby the plaintiff was injured, then you should find for the plaintiff, unless you find that the plaintiff himself was negligent in the manner in which he conducted himself, being upon the roadway at the time, and in the want of ordinary care in observing his surroundings and the situation so as to protect himself, in which case you would find for the defendant, notwithstanding the defendant itself might have been negligent. If you find, however, that the defendant was negligent and the plaintiff was not, then your verdict would be for the plaintiff.

This brings us to the question of damages. If you find for the plaintiff in this case, then you are to determine how much he is entitled to recover. The measure of damages in this case will be, if you find that the plaintiff was injured, whether slightly or greatly, or whether permanently, you will determine the loss that he has sustained, considering the probability of the length of his life from this out, and you must find what that value is at the present date. For instance, you will determine what disability he has suffered, and then you will determine how much less he would be able to earn during his natural life from this out because of that disability, and then you will find the present value of that earning power, and that will be the measure of damages on that phase of the case. I think there are some special damages pleaded here, which are the value of his services from the time he was injured to the time this suit was begun. The testimony has been that he was earning \$75 a month, and that, calculated to the time this suit was begun, amounted to \$337 and something. That would be an element of damages to be added to the other general damages. You may find also what he has been injured by reason of his suffering, both physical and mental, and what he will probably suffer by reason of this accident. Taking those three elements, and adding them all together, will be the measure of damages in this case.

Now, Gentlemen of the Jury, you are the sole judges of the effect of the evidence. You must determine for yourselves what the fact is from all the testimony in

this case, and in that your judgment must prevail. The Court instructs you as to the law of the case. You are to take the instructions of the Court implicitly, and, founded upon those instructions, you are to judge of the fact, and determine as to the negligence either of the defendant or of the plaintiff, and find your verdict accordingly.

You are the judges of the credibility of the witnesses, which you must determine from their deportment upon the witness stand, and from their demeanor, observing whether they seem to be telling the truth candidly and fairly, or reserving something, and thereby determine how much weight to give to the testimony of any single witness. You must take the credibility into consideration along with your determination as to the fact of the case. If the judge, or if I at any time give expression to any opinion as to the effect of the testimony you are to disregard that, because it is not intended that it should control. You must find entirely upon your own responsibility as to the fact in the case.

I think, Gentlemen, that this is all that is necessary to instruct you about at this time, unless counsel suggest something that I have omitted.

JUROR: Your Honor, there is one point that I would like a little more instruction upon. In regard to the measure of damages, did I understand you it was to be computed, and that we were to assume that he would be worth \$75 a month from now till the end of his life expectancy?

COURT: No, you are not to assume that. I said there was some testimony here to the effect that he

was earning \$75 a month at the time he was injured, and the plaintiff has asked special damages of \$337 for the time that intervened between the time he was injured and the time this suit was begun, and you are to determine for yourselves whether or not his services were worth \$75 per month. But you will determine for yourselves what his earning capacity was prior to the time of his injury.

JUROR: And what it would be in the future up till the fourteen years of life expectancy?

COURT: Yes, and what it will be because of his disability, if he has suffered any, up to the time of his expectancy, and the difference between what he was capable of earning prior to the accident and what he is capable of earning after his disability would be a basis for you to determine the present value of his services to the end of his life.

Mr. PLATT: If your Honor please, in submitting this question to the jury as to whether it was a private way or a semi-public way, your Honor restricted it to Supple and the Towing Company. I presume you would amplify that to include all tenants and persons having contract relations with Supple or the Towing Company, such as the East Side Boiler Works, for instance?

COURT: Oh, yes, I think that would follow.

It is hereby certified that the foregoing constitute all of the instructions given by the court to the jury on the trial of this action.

Thereupon, among others, the following proceedings were had:

COURT: I will say to counsel that the instructions asked in this case were so very numerous, and in a manner they were conflicting in order to get every phase of the case before the court's mind, that the court has not been able in the short time it has had to give them as careful consideration as it would like, but has attempted to cover such instructions as it thought were proper to give.

Mr. PLATT: Your Honor, we might have, I suppose, a formal exception to the refusal of the court to give them as asked, and that will cover it?

COURT: Yes, you may have that.

In this relation, it is hereby certified that there were at this time in the hands of the Court thirty-five written requests for instructions, which had been prepared and submitted to the Court by the defendant, prior to the arguments of counsel to the jury, among which appeared the following:

"Comes now the above named defendant, by its attorneys, Platt & Platt and Palmer L. Fales, and requests the Court to give the jury the following instructions: * * * *

I.

"Gentlemen of the Jury:

"You are instructed that the roadway leading from East Water Street west, upon which this accident took place, is, under the testimony, a private roadway. You are further instructed, from the evidence, that the plaintiff, at the time of the accident, was upon said private roadway upon his own personal business. You are further instructed that the defendant's serv-

ant, Harry Kelly, was upon said private roadway as an invited person, pursuant to contractual relations between the defendant and the East Side Boiler Works, a tenant of the owners of said private roadway. You are further instructed that, under such circumstances, the defendant is not liable in damages for the injuries complained of unless its servant, Harry Kelly, was guilty of wilful or wanton negligence towards the plaintiff. You are further instructed that, the complaint not charging that the defendant's servant was guilty of of wanton or wilful negligence, the plaintiff cannot recover in this action, and your verdict must be for the defendant."

When said instructions were given, and before the jury retired, counsel for the defendant duly excepted to the instructions of the Court, which exception was read into the record and reduced to writing by the official reporter, and was as follows:

"I desire to except to the Court's submitting to the jury, as a question of fact, the question as to whether this structure was a private way or whether it was a semi-public way, and the failure of the Court to rule on that as a proposition of law."

Said exception was then and there allowed by the Court.

In connection with said exception, it is hereby certified that the Court on its own motion gave the jury the following instruction:

"With this understanding as to the issues and the burden of proof cast upon the respective parties, we may proceed to a further ascertainment of the law

applicable to the case more in detail. Let us first understand the situation. This roadway, as the evidence has disclosed, was constructed by Mr. Supple and the Willamette & Columbia River Towing Company. For short, I will refer to that as the Towing Company hereafter. It was constructed leading from Water Street to the water front, a space of probably 200 feet, or more, and it was constructed by private enterprise, and perhaps for private purposes. But it lead to a dock or wharf, which was in use by Supple and by the Towing Company, and the use of it must be determined by you hereafter, under the rules that I shall advise you of. The way was probably 21 feet in width, and, as I have said, led from Water street to the water front, where these docks were situated. I will submit to you the question as to whether or not this driveway was a merely private way, used exclusively by the parties constructing it and their licensees, or those having their permission to use it, or whether it is more unrestricted in its use; that is, whether others have used it, or were using it, or the public generally, so as to make of it something more than a mere private way, or, in other words, something of a public way, or one which the public were accustomed to use and enjoy. I will define to you later the rules pertaining to the rights of persons in the use of and traveling upon a mere private way, as well as those pertaining to a public way or thoroughfare."

"Now, the East Side Boiler Works were situated on the south side of this driveway, perhaps 100 feet or more from Water Street. It, as you have found from

the testimony, was a tenant of the Towing Company, and it had employed the defendant company, or had ordered from the defendant company these angle-irons, and the defendant company was in the act of delivering the angle-irons to the Boiler Works at the time. The Boiler Works, therefore, being a tenant of the Towing Company and having ordered these angle-irons, gave to the defendant company permission to drive its auto-truck upon this way, in order to deliver the angle-irons to the Boiler Works. So that the act in operating this auto-truck upon this roadway was by right; that is to say, the defendant company had a perfect right from the owners of this roadway to use the roadway for the purposes of delivering these angle-irons. Now, the plaintiff was on the driveway at the time of the accident as a footman. His purpose in being there, according to his own testimony, was in the course of getting to Jones' warehouse, to procure some clothing from a trunk he had left there. This purpose is questioned by the defendant, and you may determine for yourselves what his real purpose in being there was, and, under further instructions which I will now give you, you may determine the extent of his right in being there, and the protection vouchsafed to him under the law in the use of the driveway."

"It is a duty imposed upon the employer of a driver of an auto-truck of this kind, or of a chauffeur, to exercise ordinary and reasonable care in the selection of an ordinarily skilful and competent driver; but, as I have said to you before, this question has become of

small moment in this case, the question turning more particularly upon the acts of the driver himself."

"Now, I will say to you generally, a person driving or propelling an auto-truck, automobile, vehicle, or other means of conveyance over a driveway, is bound to the observance, for the prevention of injury to others upon the way at the same time, of that degree of ordinary care, skill and precaution as is reasonably commensurate with the danger present or to be reasonably anticipated. Thus, a person propelling an auto-truck upon a public street much used by the public in all forms of travel is required to exercise much greater care, skill and precaution than if he was propelling his truck upon a street or highway but little used for travelers by vehicle and pedestrians. So he would be required to exercise greater care and precaution upon a public highway but little traveled than upon a private way, where persons with vehicles or on foot were not much expected to be found. In the case of persons constructing and having upon their premises a merely private driveway, there is no obligation devolving upon them to keep the same in repair or free from obstruction or defects, in favor of persons using the way without permission or of those who are merely licensees; that is, persons using the way of their own volition and for their own convenience only, and without invitation or inducement in any way on the part of the owners of such private way. I may instance to you what would be a private way so that you may understand it more readily. If one of you gentlemen owning a farm has opened a gateway

across your premises, or has opened a way for your private use only, that would be a merely private way, and persons who would cross through your gateway, or through your open way, that you have opened for your own convenience, without your permission, or persons who might go through there for their own convenience or volition, although you have not refused them the right,—as to these persons, you would be required to exercise the care only not to run them down or hurt them after you have found they are upon the way; that is to say, you are not under any obligation to exercise vigilance to ascertain their presence there, but if you should ascertain their presence there, then you should so conduct yourself as not to injure them. So that this is a merely private way. Now, the owners of such a merely private way further owe no duty of vigilance towards persons found thereon without their permission, or in the capacity of mere licensees, except that the owners shall not wantonly or wilfully injure them, or, if their presence is reasonably discovered, shall exercise reasonable care for their protection.”

“Now, having defined a private way to you, you will consider in this case whether or not this driveway was a mere private way, for the convenience of Supple and the Towing Company only, or whether it was something more.”

“Now, I will instance another case to you. Where a railroad company should have crossing its track a way which, perhaps, began as a merely private way, and which yet has developed into something more,

that is to say, persons have begun to cross and continued to cross until they have become accustomed to cross there in numbers, or, to more or less extent, in larger numbers, in a case of that kind the railroad company would have to exercise diligence or care and circumspection according to the travel across that way, and if it should turn out that the way was traveled by multitudes of people, then the care that would be imposed upon the railroad company to see that it did no injury would be increased correspondingly."

"Now, in this case there has been evidence introduced for the purpose of showing to you that the roadway was used for more than private purposes; notwithstanding the roadway was constructed by Supple and Mr. Jones, or the Towing Company, for their own use and for the use of their dock, that other persons beside themselves and those having business with them have been accustomed to go upon and use this roadway. You will understand that the roadway was constructed over a part of Yamhill Street, but that makes no difference in this case, because permission was obtained from the City Council, or the proper committee, for constructing this private way, and it was constructed by private enterprise and so maintained by private enterprise. But you are to determine whether or not it was used for something more than a private way—whether or not the public generally have become accustomed more or less to use and to be about and upon this way, and to use it in the way of a public highway; and then you will determine to what extent it has been so used. And if

you find that it has been used for a larger purpose than a mere private way, then that will have a bearing upon your findings as to the negligence in this case.”

“It is a case, therefore, for you to determine, first, the manner of the use and the extent thereof to which the driveway has been and was subjected, both before and at the time of the accident, and under the instructions I have given you, to determine what reasonable and ordinary care, skill, and precaution should be exacted of persons propelling auto-trucks over and upon the same for the protection of others using the same way, or rather others that might reasonably be expected to be and to be found present upon the same driveway, and especially pedestrians, if any, that might reasonably be expected to be found traveling or loitering thereon. In doing this, you must exercise your judgment as reasonable and prudent men, taking into consideration all the facts and conditions and circumstances that have been developed at the trial of this cause.”

“If you find that this driveway was something more than a mere private way, that is, one used to a more or less extent by others than the owners and tenants and licensees, or by the public in a more or less general way, and that the plaintiff was rightfully thereon, either by permission or license, or a licensee, or as one of the general public, and the defendant’s servant Kelly was negligent in so propelling his truck, without giving warning or notice of its approach, as to shove the plaintiff off the driveway and injure him, then the defendant would be liable, unless you fur-

ther find that the plaintiff was himself guilty of negligence which contributed to his own injury.”

“As to the conduct of the plaintiff while upon this driveway, it was his duty, for his own protection, to use his senses of seeing and hearing. He was required to so deport himself with ordinary and reasonable care that he would not be injured; that is to say, being upon a driveway, or a public way, or whatever it might be, unless it was merely a private way, to take note of the passage and repassage of cars or of trucks, or of vehicles of any kind, and to so conduct himself that he would not be injured. He would not be excusable if he was merely running headlong and heedless upon a way of that kind and was injured. And in this connection, I will give you an instruction which seems to be clear upon the subject, as follows:”

“I further instruct you that the law presumes that every person will exercise his natural faculties to prevent injury to himself, and if you believe from the evidence that the position occupied by the plaintiff was a dangerous one to occupy, and that the plaintiff voluntarily placed himself there, and that the dangers attendant thereto were known or should have been known to plaintiff, it was then incumbent upon the plaintiff to exercise all his natural faculties and diligence commensurate with the dangers of the position, and the failure to exercise such faculties would be contributory negligence and preclude his recovery.”

“Then another charge. I further instruct you that if you believe from the evidence that the plaintiff was familiar with the custom of heavily loaded trucks turn-

ing into the gateway leading to the East Side Boiler Works, and if you further find that the plaintiff heard or should have heard the approach of the auto-truck, it was then incumbent upon him, in exercising the duty of protecting himself from injury, to determine whether or not this particular truck was to be turned into the East Side Boiler Works, and the failure of the plaintiff to make any effort to determine the fact was contributory negligence, and he cannot recover.”

“I think this sets forth very clearly the duty of the plaintiff in being upon the driveway at that time, and in the care that he should observe for his own protection. You are therefore to determine first whether the defendant’s servant has been negligent. If you find that the defendant’s servant has been negligent in the propelling and conduct of his auto-truck upon this driveway, whereby the plaintiff was injured, then you should find for the plaintiff, unless you find that the plaintiff himself was negligent in the manner in which he conducted himself, being upon the roadway at the time, and in the want of ordinary care in observing his surroundings and the situation so as to protect himself, in which case you would find for the defendant, notwithstanding the defendant itself might have been negligent. If you find, however, that the defendant was negligent and the plaintiff was not, then your verdict would be for the plaintiff.”

And in connection with said exception Counsel for defendant made the following motion and the Court gave the following instruction to the jury:

Mr. PLATT: "If your Honor please, in submitting this question to the jury as to whether it was a private way or a semi-public way, your Honor restricted it to Supple and the Towing Company. I presume that you would amplify that to include all tenants and persons having contract relations with Supple or the Towing Company, such as the East Side Boiler Works, for instance?"

COURT: "Oh, yes, I think that would follow."

And in connection with said exception, it is hereby certified that the plaintiff, Alonzo L. Monical, testified as follows:

Q. When you met with this accident, Mr. Monical, where did you come from?

A. I came from East Davis there; come up East Davis, up Front Street to East Morrison; went down East Morrison to this roadway at Jones' and Supple's.

Q. And what were you going to do when you went onto this roadway?

A. I was going there. I got a trunk there—have a trunk there—it is there yet. I have some stuff in it, and I was going to get some truck out of it that I wanted to take away with me.

Q. What was the nature of that?

A. Of what? The stuff I wanted to get out?

Q. The truck you referred to in the trunk.

A. Well, clothing, underwear.

Q. And you were on the way to secure that were you?

A. Yes, sir.

Q. And did you meet with any one on the road-

way? If so, who?

A. Yes, sir. After I turned in on the roadway, and walked down, I suppose I was one-third, maybe, down to where the accident happened, I saw a man coming up the slip.

Q. From the west end?

A. Yes, from the west end, coming up this way and towards me, walking, and I walked up close enough. Of couses, I knew the man when I got a little closer to him. We walked up and shook hands right there where we were standing.

Q. Who was that man?

A. John Nelson; Captain John Nelson.

A. Yes, sir.

Q. And how long after you met him there was it until the accident happened to you?

A. Well, we couldn' thave been standing there not over—couldn't have been there five minutes.

Q. Now, whereabouts were you standing in relation to the opening on the south side of that roadway that leads into the East Side Boiler Works? Do you know where that opening is?

A. Yes, I have went through it many times. I know all about where the opening is. I have passed out through it.

Q. How far east, I will ask you, of that opening were you standing, about?

A. Well, I could not say. I could not say that, how far. I never thought anything about that part of it. I didn't know anything about it, never looked at it. You see I didn't stop there, only just shook hands

with him, and we talked, I suppose, maybe two minutes—I don't know—just a short time.

Q. Now, where were you standing while you were talking?

A. Standing right up close to the railing with our hands upon the railing like this.

Q. Which railing was that?

A. The end rail.

Q. The one on the north side of the roadway?

A. Yes. No, the railing right next off from the dock, the same as that dock runs this way, right on this railing here. Here comes the road, here is the railing. We were standing right over here with our hands on the rail.

COURT: That is on the north side?

A. Yes, north side.

Q. On the north side of the railing as you were going in?

A. Yes, sir.

Q. That would be your right side going up the dock?

A. If I was going back, it would be on my left side. If I was going in, it would be on my right side.

Q. Well, you were going in, weren't you?

A. Yes, sir.

Q. Were you standing in front of any opening in the railing there?

A. No, sir.

Q. Was there a railing there where you were standing?

A. Yes, sir.

Q. How high was it?

A. It came about here.

Q. Up to your chest?

A. Yes. We were standing with our arms on it, like this. He was standing on my right side. I was standing by his left, about two feet apart, likely, just standing with our arms upon the railing like that, standing there, looking down at these boats lying there below us.

Q. Where were these boats lying?

A. Lying on the ways, some of them and there was a boat in the yard at the same time.

Q. In what yard?

A. Supple's yard.

Q. On the north of this roadway?

A. Yes; yes. And there was some small boats there, gasoline boats, and the "Cash Weir", they called it. We was looking at them. We were standing there talking.

Q. Where was Nelson standing at the time?

A. Standing on the right hand side of me, about two feet from me, I think likely—I don't know.

Q. Was he to the east or west of you?

A. East.

Q. Was he nearer Water Street, or nearer the dock?

A. Nearer Water Street.

Q. Then, he would be east of you a little?

A. Yes.

Q. Now, how were you standing, facing what direction?

A. Facing down the river, south.

Q. Facing down the river? You mean by that, towards the north?

A. Yes. It would be facing the Morrison Street bridge.

Q. Now, did you have your face or your back to the roadway?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. I mean, the roadway on which you were standing?

A. Yes. Our back out we were standing there, and the roadway was right here.

Q. Your back?

A. Yes.

Q. And how was Captain Nelson? Was he standing in the same way?

A. He had his arms up on the rail, is all I can say about that. I didn't know how he was standing with his feet, or anything about that. He couldn't have had his feet up on the railing.

Q. Which direction was he looking?

A. He was looking down on those boats. We was talking about those boats.

Q. In Supple's yard?

A. Yes, sir.

Q. Were you both standing there at the time that you were struck in that way?

A. Yes, sir.

Q. What happened to you while you were stand-

ing in that position? Tell the jury what occurred, as near as you remember.

A. Well, I cannot tell anything about what occurred. I know there was something. I was struck by something, but what it was, I don't know, for I didn't see anything, and I never knowed what it was that hit me for ten or fifteen days after I was in the hospital.

Q. Where did it strike you?

A. Right in here—right in the short ribs.

Q. Did you know what it was that did strike you?

A. No, sir, I didn't know what it was.

Q. Did you receive any warning?

A. No. I heard nothing.

Q. Before you were struck?

A. No, I didn't hear anything before or after. A warning after that wouldn't have been any good.

Q. Did you hear the sounding of any gong?

A. No, sir.

Q. Or bell?

A. No, sir.

Q. Or whistle?

A. No, sir.

Q. Or anything to give you warning that a truck was going to turn into that East Side Boiler Works opening?

A. No, I did not.

Q. Before you were struck?

A. I did not.

Q. How long have you been in the habit of going on that roadway and passing over it, Mr. Monical?

A. Ever since it was built. I was working for the company at the time it was built. They used that—that was put there for use publicly, and everything to come in there, whatever they wanted in that yard, at the Boiler Works. People would bring in machinery, go in there to be repaired, come in on that road and out. There was always vehicles coming in.

Q. To what extent has that roadway been used by the public?

A. For anything that would come up that it could be used for—such as cement. He handled cement, you know. Stuff such as that.

Q. Does everybody go there that wanted to?

A. I never saw anybody refused. It was always open. No gateway on it.

Q. I ask you, does everybody go there that wanted to?

A. I never heard tell of anybody being turned away.

Q. It has been used for how many years, to your knowledge? By the public generally, for vehicles and pedestrians?

A. Well, I couldn't say how long. I forgot what was there the days before they put this new one in. This new one, I think, has been there about four or five years.

Q. You don't understand my question. How long has it been used by the public generally for vehicles and pedestrians to pass over it, how many years?

Mr. PLATT: I object, if the Court please, to the form of the question. The witness has stated what

the dock has been used for—people going to these different business enterprises there.

COURT: He may state how long it has been used in that capacity. You may state to the jury how long it has been used in that capacity.

A. Well, I cannot say just how long.

COURT: Well, about how long, as near as you can tell?

A. Well, it has been used something over four years, I think.

COURT: Do you deny, Mr. Platt, but what that roadway is used by the public, that is, by persons having occasion to go into that mill?

Mr. PLATT: No. But we deny that anybody who was going there except for that purpose, had any other position than that of what is known as implied licensee.

COURT: Proceed, Mr. St. Rayner.

Q. During the four or more years you say you have been in the habit of using that roadway—

A. Yes, sir.

Q. How far is the roadway used? To what extent?

COURT: You mean from Water Street?

Mr. ST. RAYNER: Yes.

Q. From Water Street to the river front, to what extent?

A. Oh, I suppose 200 or 300 feet, something like that—400. I don't know. I never measured it—never thought of it.

Q. The whole distance to the dock, to Supple's

dock?

A. Oh, I couldn't tell you. I never thought of such a thing as that, of taking the distance, or anything.

Q. Well, I am not asking you for how many feet, but what portion of the roadway has been used by the public generally that you have testified to—the whole length of it, or only a part of it?

A. The whole length, and onto the Supple's dock.

Q. The whole length from Water Street onto Supple's dock?

A. Yes, sir.

Cross Examination.

Q. Now, you say this elevated roadway where this accident took place is used to get into Supple's dock and also into the East Side Boiler Works? That is correct, is it not?

A. Yes, sir.

Q. There isn't any sidewalk there for foot passengers, is there?

A. No, not that I know of. I don't know whether they aim to put a sidewalk or not. It is a road, about 20 feet of roadway.

Q. Now, how long prior to the time that you were hurt at this place of accident was it that you had been there before? When were you there before that?

A. Oh, I suppose it was three months, I reckon.

Q. Yes. Well now, how many times had you had occasion to go over to this property and over this

roadway during the time, this three years that you had worked for the Shaver people, after you left Jones' employ?

A. Oh, I don't know, I had been over there several times, I suppose maybe half a dozen times, in the time. I would go over there and go to the office to see if there was any mail.

Q. To the office?

A. Yes.

Q. Well, the office is on East Water Street, isn't it?

A. Which?

Q. The office of the Jones people is on East Water Street?

A. Yes.

Q. You would not have to go onto this roadway at all to go to the office?

A. No, not then.

Q. You would not have to go onto the roadway at all to get to the Jones office, would you?

A. No, not if you wanted to go to the office; but if you wanted to go to the warehouse, you had to go the other way.

Q. Well now, where is the warehouse?

A. It is right on the left hand side of the road that you come in onto the dock on, on the left hand side coming in, there is the warehouse. They had a warehouse they kept their goods in, provisions and stuff that were for the boats, and everything; they had it locked up in there.

Q. Where was this warehouse with reference to

the passage way leading into the East Side Boiler Works?

A. Well, the warehouse come first back of the office, then come a long—well, enough stable room to stable twelve head of horses. Then come the machine work, machine shop. The boiler works is not there. It is on the corner.

Q. The boiler works is further south?

A. Yes, on the corner.

Q. You go through?

A. Yes, this way, makes that turn.

Q. Now, this warehouse, as I understand you, is immediately back of the office there near East Water Street?

A. Yes, pretty close. I don't know as you can call it—they call it a store room. They kept all their provisions and such as that for the boats.

Q. How do you get into that—through the office?

A. Through the office, or there is a side door, either one.

Q. Where is the side door, on which side?

A. On the outside of the building, on the inside.

Q. On Jones' side or on Supple's side?

A. Yes, on Jones' side.

Q. The other side of this warehouse, and the south side?

A. Yes.

Q. And your trunk was kept in that warehouse?

A. Yes.

Q. Well now, if this warehouse was immediately back of this office, and the entrance to the warehouse

was over on the south side of it, what occasion was there to go onto this elevated roadway to get into that warehouse?

A. Because you cannot go into the warehouse now, or ain't for a year or better in the front. You have got to come down there to go in, to get into this warehouse to a door from the shop; open the door for us, open the door and we go right in there, to the best of my knowledge.

Q. Isn't it a fact that the main passage way from Water Street to the Jones part of this joint property, and to where Jones fastens up his boats, and where you get into Jones' warehouse, is over south of these buildings?

A. From the office?

Q. Yes.

A. Well, yes, to come from the office.

Q. From Water Street too?

A. Yes, it is on Water Street, the office is.

Q. So that there is no occasion to go onto this roadway to get into that warehouse?

A. No.

Q. Isn't that a fact?

A. Oh, that is all right. Just wait till I tell you a little more, will you?

Q. Well, that is what I want to get at now.

A. When I went there, there was nobody in the office. There is a gateway, you know, across the front there. There is a gateway across the front of this entrance you claim goes down inside there. Here is the office, and there is the gateway, and comes

over to the building over here. Then fastens that up there. That is fastened up. If there is nobody around there, you cannot go in there. You can go down there. This entrance to the machine shop, you can walk right around there, and come up to the entrance to the dock; and if you want to go into the warehouse, you can unlock it if you have got a key. You always can get a key from some of the men there.

Q. Was there any reason why you couldn't open the gate?

A. What?

Q. Any reason why you couldn't open the gate on the south side?

A. Well, they never used it. They never used it for any one to travel. I have heard them say they didn't want any one to open that gate and travel in there; that road was on the outside.

Q. But you went on this occasion down this elevated roadway?

A. I went down the public roadway—supposed it to be public there. There is no signs to show that it was not.

Q. Now, when did you leave this trunk there, Mr. Monical?

A. About three years or four, when I left. About two years or two and a half years before I went to work for Shaver. I worked for them, and worked nearly three years for them. And when I left there, I left the trunk there. What day I left it there I could not tell you, but I left it there, and went to work for Shaver. And I was to that trunk twice in that time

to get parcels out that I wanted out. I had no place to keep them. Anything I wanted I would put it in there, and go and get it when I wanted it. I asked Mr. Jones about leaving the trunk, and he said it was all right—it was not in his way—if I wanted to leave it there, why leave it.

Q. Did you pay anything for the privilege of leaving it there?

A. Did I? I would pay anything if he wanted it, if he asked it.

Redirect Examination.

Q. You spoke about people going into the office of Jones down by Water Street, and you said that there is a gate there that was closed when you went there that day, and you had been told by Jones that he didn't want anybody going through there. Now, which way was it that the public was in the habit of going in order to go onto those premises?

A. Took the roadway on the outside.

Q. To go where?

A. Into the boiler shop, or any place on the lower docks.

Q. To go through that opening?

A. Yes.

Q. Near where you were at this time?

A. There is an opening there, and just a little ways further there was another opening there when this would be closed. Sometimes this opening here was closed. There is a small opening here, an entrance just about like a door, common door, walk by and go in at it going across to work or around the

boats.

And in connection with said exception it is hereby certified that plaintiff's witness, Captain John E. Nelson, testified as follows:

Q. What were you engaged in doing on the 25th of last March?

A. Well, at that time I had gone over to see about going pilot on a tug boat lying there at Supple's dock. I had just left the railroad bridge company's boats, and went over there to go to work.

Q. Went over there for what purpose?

A. I went over there to see about going pilot on the tug boat that was lying there.

Q. And after attending to that, what did you do?

A. Well, I started off from the dock up the slip, and just as I got on the roadway, there, I met Mr. Monical, and we stopped and shook hands, and leaned up on the railing. There is a railing runs along on the north side of the roadway.

Q. Which roadway do you refer to?

A. From Water Street out to Supple's dock.

Q. Where Mr. Monical met this injury?

A. Yes, right at that point.

Q. Now tell the jury what happened there, what you did, and what Mr. Monical did, and about the accident.

A. Well, we hadn't met for quite awhile, and naturally friends, we stopped and shook hands and talked. We were talking about steamboats, and different things, and Mr. Monical spoke to me about he thought he would try and rent the "Cash Weir."

Also he had gone down to see about his trunk. And we hadn't been standing there but a very few moments, leaning with our arms on the rail. There was a piece along the railing there that the upright piece is fastened to, and I was standing on that, just leaning over, with my arms on the railing, and this truck came along and struck us. * * *

'Q. What has been the custom in regard to the use of that dock prior to that time by the public generally, and the roadway?

A. Everybody goes out on the dock that wish to.

Q. Over this roadway?

A. Yes, sir.

Q. Open for everybody?

A. Yes, sir.

A. What, in regards to the boats landing there, and so on?

Q. Yes.

A. I have landed there on several occasions.

Q. And passengers—pedestrians?

A. Well, I had no passengers.

Q. I don't mean your passengers, but foot passengers going up the roadway?

A. Oh, it is a common thing to see people walking back and forth there.

Q. The public generally go there who want to?

A. Yes, sir.

'Q. How long has that been going on to your knowledge?

A. Well, most any day you go over there you can see somebody walking back and forth. Perhaps they

are going down to the boats. There was for quite awhile that the Columbia Contracting Company had two or three boats laying there. Well, there is quite a crew on these three boats. They would be going back and forth all the time.

Q. Just the the same as in any other road or street in the city?

A. Yes, just the same; no difference at all whatever.

Cross Examination.

Question by Mr. PLATT:

You say just the same as any other roadway in the city?

A. Yes, sir, as far as traffice is concerned.

Q. The same as Morrison Street out here?

A. Every bit. Anybody who wanted to go down there, go down. There was nobody ever stopped you.

Q. They didn't go anywhere, did they, except to Supple's dock?

A. Oh, yes, they could. They could go in onto the Willamette and Columbia River Towing Company's dock, or on the boats.

Q. There is no occasion for anybody to go over there unless they have business there, at Supple's dock or Jones' dock, or the East Side Boiler Works, was there?

A. I don't see why.

Q. It don't go anywhere, does it? It goes to the water?

A. You can go out there, and get sights of the river front. Lots of times a man will take a walk out

or the dock that has no particular business.

Q. You didn't mean to say that lead anywhere else?

A. Yes, it leads places. It leads out to the boats that are laying there. Somebody might want to go out and look at the boats.

Q. When you say they go the same as they do on any other street in the city—

A. They do, the same as any other docks.

Q. You are talking about docks, now?

A. This was a wharf.

Q. Was it like a street?

A. Just the same as going down on any other dock.

Q. Just like a dock, not like a street, is it?

A. It was a half street, isn't it?

Q. Well, is it a street or a dock?

A. Well, on that roadway—

Q. Yes.

A. I should think you would call it a street—half a street—the roadway. It is the entrance to the dock.

Q. If you kept walking you would get into the water, wouldn't you?

A. No, sir, not unless you fell off the dock. You would do that if you fell off the bridge.

Q. You know it is a dock, and not a street. Be fair about it.

A. I know what is a dock?

Q. That structure.

A. I know there is a road to go out to the docks.

Q. A roadway to go onto the docks?

A. Either the Willamette Towing Company dock, or the Supple dock.

And in connection with said exception, it is hereby certified that plaintiff's witness, Dick Turpin, testified as follows:

Q. Do you know anything about whether the public generally are in the habit of using that roadway?

A. Yes, sir, all go out there.

Q. Both vehicles and pedestrians?

A. I have went out there with my machine—I have a machine. I went out there with that machine—rode out there with Mr. Beel, too.

Q. How long has it been used in that way by the public generally?

A. Ever since Mr. Supple built the dock. I think in the neighborhood of maybe three or four years. I wouldn't like to say exactly, because I never kept any track of it, but I should think in the neighborhood of three or four years.

Redirect Examination.

Q. You have seen other men standing at this railing, have you, while auto-trucks have passed?

A. Yes, lots of men have stood there and watched us working on the dredger.

And in connection with said exception, it is hereby certified that plaintiff's witness, G. J. Smale, testified as follows:

Q. Was there anything to obstruct the view of the chauffeur who was operating the truck, so that he could not see these two men on that roadway?

A. No, sir, not a thing to obstruct his view.

Q. Have you seen other men standing at that railing and looking down?

A. Yes, sir.

Q. When automobiles have been passing?

A. Yes, sir.

Q. How often do they do that?

A. Well, several times through the day we have looked up, and saw them standing on the roadway looking down at us working on the dredge, setting in machinery and one thing and another.

Q. And trucks going by auto-trucks?

A. Yes, sir, all kinds of vehicles.

Q. To what extent has the public been using that roadway, Mr. Smale, to your knowledge?

A. Why, as far as my judgment is, there is cement docks out there and one thing and another, they use this roadway going out to it, and to the East Side Boiler Works, and Jones', and out to the boats that are landing in there, that is, tow boats, employees from them go back and forth, and other people. I have been back and forth there myself several times.

Q. It is open for the public generally?

A. Yes, sir, open for the public.

Q. Both vehicles and pedestrians?

A. Nothing to stop them. In fact, the city has sewerage pipes laid in from Water Street right along this runway into the river.

And in connection with said exception, it is hereby certified that plaintiff's witness, William C. Cohen, testified as follows:

Q. Do you know anything about whether that

roadway has been used by the public generally?

A. It has since I have been acquainted with the place.

Q. Ever since you have been?

A. Yes.

Q. For what kind of travel?

A. Well, to and from Supple's dock with all kinds of hauling, and from the Willamette and Columbia River Towing Company with all their deliveries of stuff, either to and from the boat and for general traffic that would come up off those boats.

Q. Both vehicles and pedestrians?

A. Yes, sir.

Q. Do you know anything about whether there has been any habit of men standing at that railing where you saw this plaintiff at that time?

Mr. PLATT: Objected to on the ground that it is not competent. Contributory negligence of somebody else would not excuse this.

COURT: I don't think that is competent. You can inquire as to how that tramway was used by pedestrians.

Q. Well, I will ask you, how was that tramway used by pedestrians? How was it used? In what way?

A. Just whenever they wanted to use it, for any and all purposes, so far as I know, ever since I have been there; and I have been right there for two years.

Q. In what portion of it would they walk or stand?

A. Well, usually on the outside, next to the railing.

Q. Where this plaintiff was?

A. Yes, sir.

And in connection with said exception, it is hereby certified that plaintiff's witness, Joseph Supple, testified as follows:

Q. Are you acquainted with the premises, Mr. Supple, known as the Supple dock, and the roadway leading to the Supple dock from Water Street, on the East side of the river?

A. Yes, sir.

Q. How long have you known that?

A. Ever since they were built. I built them.

Q. When was it built?

A. Why, I think it was in 1906.

Q. What has it been used for, Mr. Supple, since it was built?

A. A roadway to go out to the river and the docks out there.

Q. And whom has it been used by generally?

A. The public, everybody. Nobody had any privilege on it. As a public dock, that is all—a public roadway. I got a permit from the city to build it.

Q. Over the city street?

A. Well, I suppose it was a city street at that time. Since then they have had some controversy about it, and they claim that the streets from Water Street out to the river belong to the blocks—to the center of each street belongs to the blocks. But at the time when I got the permit from the city, I supposed it

was the city ruled the streets.

Q. And what street is it that you refer to?

A. Yamhill Street.

Q. East Yamhill Street?

A. Yes, the foot of Yamhill Street.

Q. And you got a permit from the city to construct this roadway over the street, did you?

A. Yes, sir.

Q. From the harbor line to Water Street.

A. Yes.

Q. And you constructed it for the use of the public and for your own generally, did you?

A. Yes, sir.

Mr. PLATT: I suggest, if counsel wants to be sworn—

Q. How has it been used?

COURT: Those questions are very leading.

Mr. ST. RAYNER: Yes, your Honor. I didn't think of that.

COURT: The witness can answer the questions.

Q. Then how has it been used since you constructed it, Mr. Supple?

A. It has been used for a public roadway, to get out to the docks.

Q. And in what way has it been used?

A. In what way?

Q. For pedestrians and vehicles, or what?

A. Yes, everybody used it. Walk out there, or drive, or go any way you want to go out.

Q. And by whose permission was that—yours?

A. Why, I got the permit from the city to improve

the street. There were three blocks there, and there were a lot of old shacks and things obstructing these streets; and in 1905 Mr. Jones, owning the block south of me, and Mr. Leonard owning the block north of me—Mr. Wanzer was in the city engineer's office, and he said if we got permits to fix the streets, to improve the streets, why, he would clear the streets out of these shacks, so we could get out to the dock. So we got these permits, but after we got them he could not clear the street out, so it ran on until the next year. Next year I built the dock out there fronting my property, and then I built this roadway at Yamhill street to get to the dock, and since then it has been a public highway—nobody has ever been refused to use it.

Q. And the public all use it?

A. Yes, sir.

Q. With your permission?

A. Yes, sir.

Cross Examination.

Questions by Mr. PLATT:

Now, this was built jointly by Captain Jones' company—the Willamette & Columbia River Towing Company and yourself, was it?

A. Well, when I built the dock, I built the dock, all that was in the water of it, and so when I built it I had an arrangement with Captain Jones, and I said, "Now, I will build it on your side of the street, and that will give me more room in the shipyard, and you can use the dock as much as you want to that is front-

ing on your street and around there." And then when I got in as far as the street, about 150 feet from Water Street, why, Captain Jones says, "I will finish up this dock." He says, "I don't want to use the dock unless I pay for part of it." So he finished that up, the last 150 feet to Water Street.

Q. Now, this request that you made of the city for permission to build this structure there ran in the name of the Willamette River Towing Company as well as yourself?

A. Both of us. We got the privilege for to improve these two streets in 1905, in order to get these shacks out of the way, so that we could get out to use our property.

Q. Your primary object was to get these shacks out?

A. Yes, sir. After that I built the dock, and then I ran the street out on that permit. I never got any other permit.

Q. Now, in your application for leave to build this roadway, you requested permission from the city to build it for your own purposes, didn't you?

A. I couldn't say about that.

Q. That was what you were trying to get, was access to your improvements that you either had or intended to make?

A. Yes. Yes, sir.

Q. And your application was in that form, and not in the form of permission to improve the street, was it not?

A. Well, as I told you, Mr. Wanzer—we wanted

to get these shacks out of the way so that we could get out and use our property, and we could not get them,—there was no way of getting them out of the street. They blocked the street. And Mr. Wanzer says, “You three people that own these blocks get a permit from the council from Water Street to the harbor-line, and I will get the shacks out of the way.” So after we got it he could not do it then. So then we bought the people out and bought the shacks—Mr. Jones and myself.

Q. Well, now, you and Mr. Jones constructed this elevated roadway?

A. Yes, sir.

Q. And who has kept up the repairs on it?

A. I have.

Q. Has the City of Portland ever done anything towards the repair of it?

A. Not a thing. Not a thing that I know of.

Q. Has the City of Portland exercised any dominion over that structure since you built it?

A. No, sir, not that I know of.

Q. Is there any reason today why you cannot put a gate at Water Street and shut anybody out of there that you want to?

Objected to as a conclusion of law and incompetent. Objection overruled.

A. You say is there any reason?

Q. You and Mr. Jones.

A. Why, I don't know whether I could shut it up or not. If I could shut that up, I could shut the whole East Side from the water.

Q. Now, your dock out there is used as a cement dock, is it not?

A. Mostly, yes, sir. We transfer anything over it.

Q. And automobile trucks go back and forth there a great deal to get cement?

A. Yes, sir.

Q. And turn in to this East Side Boiler Works with material for the Boiler Works?

A. Yes, sir.

And in connection with said exception, it is hereby certified that plaintiff's witness, William E. Jones, testified as follows:

Q. Are you a member or an officer of the Willamette & Columbia River Towing Company?

A. Yes, sir.

Q. How long have you been such?

A. About 15 or 16 years.

Q. What official position do you occupy with that company?

A. Secretary and treasurer.

Q. And how long have you occupied that?

A. About that long. About fifteen years, I think.

Q. Your company is the company that, in conjunction with Mr. Joseph Supple, constructed the dock and the roadway in question, was it?

A. Yes, sir.

Q. What was the purpose of the construction of that roadway, and for what has it been used since it was constructed, Mr. Jones?

A. It was to get to the dock and the river front.

Q. To the river front?

A. Yes, sir.

Q. From the harbor-line to where?

A. To Water Street.

Q. And how has it been used by the public since then?

A. Well, the public has been using it. The public never was excluded from it. Everybody has the privilege there that wants to go there.

Q. How long have they had that privilege?

A. Ever since it was built.

Q. And how have they used it, for pedestrians and vehicles generally?

A. No, the vehicles hasn't any business there, that is, unless they were going to the dock. There is no outlet to it, only if they go out there, they have got to come back the same way.

Q. Do you know the plaintiff in this case—Mr. Monical?

A. Yes, sir.

Q. How long did he work for your company, if at all?

A. Why, as near as I can remember, it would be about seven or eight years, probably.

Q. Were you aware of the fact that he was in the habit of going on that roadway, and upon your premises, on the south side of it?

A. Yes, sir.

Q. For how long has he been doing that?

A. Well, ever since we have been there occupying that.

Q. Did he go there with the permission of your company and yourself.

A. Well, I never gave him any special permission to go there; nor I never told him not to.

Q. Did you consider that he had a right to be there?

A. Yes, sir.

Mr. PLATT: Oh, state the facts. This witness cannot pass on the law of this case.

Q. How long do you say he has been in the habit of going there, Mr. Jones?

A. Ever since the roadway was built.

COURT: That way was built for the purpose of giving access to your dock, or to Supple's dock there, was it not?

A. Yes, sir. We had a private roadway of our own, but the roadway was wearing out, and we didn't care about rebuilding it and maintaining two, so we helped Supple build this roadway.

COURT: Well, the purpose was to give access to your dock?

A. Yes, sir.

COURT: After it was built it was opened up to the street?

A. Yes, sir.

COURT: And then you allowed the use of it by such vehicles, or the people that desired to go in to your dock?

A. Yes, sir.

COURT: And passing in and out by that way?

A. Yes, sir.

Cross Examination.

Questions by Mr. FALES:

Mr. Jones, what is your interest in that dock at the present time; that is to say, the Willamette & Columbia River Towing Company?

A. Well, no particular interest in the dock. Mr. Supple built the dock.

Q. I mean, in the roadway rather, Mr. Jones?

A. Well, we built about half the roadway.

Q. Do you claim to own half the roadway?

A. Yes, sir.

Q. If Mr. Supple would propose to give this away, would you think that you were entitled to an objection?

A. Yes, sir.

Q. Did you ever exclude the public from this roadway?

A. No, sir.

Q. Did you ever grant members of the public who had no particular business either at the Supple dock or at your own premises permission or direction to use it?

A. No. I never gave anybody privilege to use it, and never told anybody not to use it.

Q. Is there any sign on the dock stating that it is a private road?

A. No, sir.

Q. Did you ever put one there?

A. No, sir.

Q. You have described another roadway that you used to use formerly, in connection with your descrip-

tion of your building of this one. Will you state for what purpose the old roadway is used at this time?

A. Just for foot traffic.

Q. Is it a proper method of ingress and egress to your particular dock, that you use yourselves for your own boats, for foot passengers?

A. Yes, sir.

Q. Is it the one that is used principally by your men going to your boats, or people having business with your boats?

A. Well, it is between our office and the boats, because it is further around by the roadway in the street.

Q. Men who are employed upon your boats would naturally use the roadway on the north side, would they?

A. If they were going between the office and the boats, they would.

Q. Rather the south side.

A. If they were going between the office and the boats, they would use it, but if they were going to town, towards Morrison street, why, there is no preference.

Q. If the men were in the transaction of your business, ordinarily, then, would they use the south one in preference to the north?

A. Well, they would if they were coming to the office.

Q. State whether or not they would sometimes go the other way, and if so, for what purpose?

A. Well, they might have different purposes.

They might have the object of getting up town without being seen, or something like that, without passing the office.

Q. That is to say, if they wanted to go up town, and they didn't want you to know it, they might go out that outside roadway?

A. Yes; they wouldn't have to pass the office on that roadway.

Q. They would sometimes go over to town, then, when you would rather they would not?

A. Well, they might go over sometimes when, for instance, the boat might be laying waiting for orders, and they wanted to run over town quick and back, they might just pass up the other way so nobody would see them.

Q. Have you ever excluded foot passengers from the roadway, or rather the foot walk on the south, next to your office?

A. No, sir.

Q. Would they use this roadway in getting to your warehouse on the south, the one next to your office?

A. Well, it runs right into the warehouse.

Q. How near is the warehouse from the entrance on Water Street to that roadway on the south?

A. About 30 feet.

Q. How much further would it be to go the other way, around the north, on the outside roadway?

A. The roadways are about 30 feet apart, I think.

Q. Yes, but would they not have to go away down to the entrance to the East Side Boiler Works, in

order to get around back to the warehouse?

A. Well, they would have to go 60 feet, probably —30 feet each way, to get to the roadway that is in the street.

COURT: What is the object of this cross-examination?

Mr. FALES: It is simply our desire, if your Honor please, to show the condition of the property by this witness.

COURT: I think that is pretty well understood. You are taking up a good deal of the time of the court. Unless there is some special object, I don't think it is necessary to prolong it.

Mr. FALES: Very well, your Honor.

And in connection with said exception, it is hereby certified that defendant's witness, W. E. Jones, testified as follows:

Q. Did you ever know of Mr. Monical, the plaintiff here, having a trunk in that commissary warehouse?

A. I never knew it until the last few days, but I believe that he has got a trunk there.

And it is further certified, in connection with said exception, that defendant introduced in evidence certified copies from the office of the Auditor of the City of Portland of an application of the Willamette & Columbia River Towing Company and Joseph Supple for permission to use the continuations of Belmont and East Yamhill Streets from the west line of East Water Street to their termini at the Willamette River, and a certified copy of the action of the Execut-

ive Board and Street Committee of the Executive Board therein, which were received in evidence and marked defendant's exhibits 6 and 7 respectively, and are copies of the permit and application referred to in the testimony of Mr. Joseph Supple, and are in words, letters and figures as follows, to-wit:

[Defendant's Exhibit 6.]

"Office and yard, foot of Belmont Street. Most central yard in city. Phone East 421.

JOSEPH SUPPLE,

Boat Yard and Marine Ways.

Portland, Oregon, May 11, 1905.

Hon. Geo. H. Williams,

Mayor and Chairman of Executive Board:

Sir:

We, your undersigned petitioners, being the owners of all of blocks 5, 6, 7, East Portland, between which lie the continuations of Belmont and East Yamhill Streets, from East Water Street West, would respectfully present the following:

WHEREAS, Said street continuations are unimproved and of no public use or benefit, and

WHEREAS, It is necessary in the pursuit of the industries carried on by the property owners on said blocks, consisting of shipbuilding and docks, that they have the use of said street continuations,

THEREFORE, We would respectfully pray that you grant us a permit to use the continuations of Belmont and East Yamhill Streets from the west line of East Water Street to their termini at the Willamette River, until such time as they may be publicly made.

And we your petitioners, for this relief will ever pray.

WILLAMETTE & COLUMBIA RIVER TOW-
ING CO.

By F. B. Jones.

All Block 7.

H. C. LEONARD,

Owner of Two-third Block No. 5.

B. G. WHITEHENS,

Executor of John Green Estate.

JOSEPH SUPPLE,

All of Block 6.

[On back:] Petition of Willamette River Towing Co., et al for use of Belmont and East Yamhill Streets from E. Water Street to River.

June 9th, 1905, Council.

"Portland, Oregon, June 14, 1905.

To the Hon. Mayor and Council of the City of Portland, Oregon:

Gentlemen:

I have the honor to submit herewith petition to the Willamette River Towing Company, et al, for permission to use Belmont Street and East Yamhill Street between East Water Street and the Willamette River, the same having been referred to you by the Executive Board in regular session the 9th inst.

Yours respectfully,

AUDITOR of the CITY of PORTLAND,

[On back:] Communication from Executive Board submitting petition of Willamette River Towing Co., et al, for permission to use certain streets in East Portland.

June 14, 1905.

Refd. to Sts.

Filed June 14, 1905.

THOS. C. DEVLIN, AUDITOR of the CITY of
PORTLAND,

By W. D. Smith,

Deputy.

“Portland, June 16, 1905.

To the Honorable Mayor and Council of the City of
Portland:

Gentlemen:

Your committee on streets, to whom was referred the annexed communication from the Executive Board, submitting petition of the Willamette River Towing Co. et al, for permission to use certain streets in East Portland, having had the same under consideration, respectfully recommend that the prayer of the petitioners be granted.

Respectfully submitted,

L. ZIMMERMAN,

JOHN P. SHARKEY,

A. K. BENTON,

Committee on Streets.

[On back:] 9. Report of the Committe on Streets, on communication from Executive Board, submitting petition of Willamette River Towing Co. et al, for permission to use certain streets in East Portland.

Filed June 16, 1905.

THOS. C. DEVLIN,

Auditor of the City of Portland.

By W. S. Lotan,

Deputy.

June 21, 1905, adopted.

STATE OF OREGON,

County of Multnomah—ss.

City of Portland.

I, A. L. Barbur, Auditor of the City of Portland, do hereby certify that I have compared the foregoing copy of papers in connection with granting Willamette River Towing Co. et al, permission to use certain streets in East Portland with the original thereof, and that the same is a full, true, and correct transcript of such original papers, as the same appears on file and of record in my office and in my care and custody.

In witness whereof, I have hereunto set my hand and the seal of the City of Portland affixed, this 3rd day of January, 1912.

A. L. BARBUR,

Auditor of the City of Portland.

(Seal.) By L. E. Burdick,

Deputy.

[On back:]

No. 3849.

MONKEL v. P. HDW. & S. CO.

Filed Jan. 8, 1912.

A. M. CANNON,

Clerk U. S. Dist. Court.

[Defendant's Exhibit 7.]

"A regular meeting of the Executive Board of the City of Portland, Oregon was held this 9th day of June, 1905, at 4 o'clock P. M.

Those present were: His Honor, Mayor Williams, presiding, and Messrs. Beebe, Boise, Cobb, Fliedner, Glisan, Goddard and Weber, 8.

Officers in attendance: Thos. C. Devlin, auditor; D. Campbell, Chief of the Fire Department; L. A. McNary, city attorney; Chas. Wanzer, city engineer, and A. Donaldson, superintendent of street cleaning and sprinkling.

PETITIONS AND COMMUNICATIONS, ETC.

Petition of the Willamette River Towing Company et al, for permission to use Belmont and East Yamhill Streets from East Water Street to the river was presented and read and, by unanimous consent, said petition was referred to the council.

By unanimous consent, the Board adjourned.

THOS. C. DEVLIN,

Auditor of the City of Portland.

“An adjourned meeting of the Council of the City of Portland was held this 14th day of June, at 2:00 o'clock P. M.

His Honor, Mayor Williams, presiding. Officers in attendance: Thos. C. Devlin, auditor, and C. S. Simmons, special police.

The roll being called, the following members were noted as being present: Councilmen Albee, Bentley, Flegel, Merrill, Rumelin, Sharkey, Sherrett. 7.

PETITIONS, MEMORIALS, COMMUNICATIONS, ETC.

Communication was received from the executive board transmitting petition of the Willamette River Towing Company et al, for permission to use Belmont Street and East Yamhill Street between East Water Street and the Willamette River, and, by unanimous

consent, said matter was referred to the Committee on Streets.

On motion of Councilman Flegel, duly seconded and carried, the Council adjourned.

THOS. C. DEVLIN,

Auditor of the City of Portland.

A regular meeting of the council of the City of Portland, Oregon, was held this 21st day of June, 1905, at 2 o'clock P. M.

His Honor, Mayor Geo. H. Williams, presiding. Officers in attendance: Thos. C. Devlin, auditor, and C. S. Simmons, special police.

The roll being called, the following members of the council were noted as being present: Councilmen Albee, Flegel, Sharkey, Sherrett, Whiting and Zimmerman. 6.

PETITIONS, COMMUNICATIONS, MEMORIALS, ETC.

At this time Councilman Foeller appeared and took his seat.

STREETS.

The committee on streets, to which was referred communication from the Executive Board submitting petition of the Willamette River Towing Co. et al, for permission to use certain streets in East Portland presented a report recommending "that the prayer of the petitioners be granted."

On motion of Councilman Zimmerman, duly seconded and carried, the report of the committee was adopted.

By unanimous consent, the council adjourned to meet on Monday, June 26, 1905, at 2 o'clock P. M.

THOS. C. DEVLIN,

Auditor of the City of Portland.

STATE OF OREGON,

County of Multnomah—ss.

City of Portland.

I, A. L. Barbur, Auditor of the City of Portland, do hereby certify that I have compared the foregoing copy of that portion of the minutes of the Executive Board and the Council relative to granting permission to Willamette River Towing Co. et al, to use certain streets in East Portland, contained therein, with the original thereof, and that the same is a full, true, and correct transcript of such original minutes as the same appears on file and of record in my office and in my care and custody.

In witness whereof, I have hereunto set my hand and the seal of the City of Portland, affixed this 3rd day of January, 1912.

A. L. BARBUR,

Auditor of the City of Portland.

By L. E. Burdick,

Deputy."

[On back:] 3849.

MONKEL v. PAC. HDW. & S. CO.

Filed Jan. 8, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And now, because the foregoing matters and things are not of record in this cause, I, Chas. E. Wolverton, District Judge, and the Judge trying the above entitled action in the District Court of the United States for the District of Oregon, hereby certify that the foregoing Bill of Exceptions truly states the proceedings had before me on the trial of the above entitled action, and contains all the evidence introduced by either of the said parties during said trial, and all of the instructions of the court, and that the foregoing truly states the ruling of the court on the questions of law presented, and that the exceptions taken by the defendant appearing therein were duly taken and duly allowed; that said Bill of Exceptions was duly prepared and submitted within the time allowed by the order of the court, which order was made before the end of the trial term, to-wit: On the 7th day of February, 1912, and by this reference made a part hereof, and is now signed, sealed, and settled as and for the Bill of Exceptions in the above entitled action, and the same is ordered to be made a part of the record in said action.

In witness whereof, I have hereunto set my hand and seal.

CHAS. E. WOLVERTON,
Judge.

Dated this 2nd day of May, A. D., 1912.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, a petition for writ of error in words and figures as follows, to-wit:

[Petition for Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL, Plaintiff,

vs.

PACIFIC HARDWARE and STEEL COMPANY,
a corporation, Defendant.

To the Honorable Judges of the District Court of the
United States for the District of Oregon:

Pacific Hardware and Steel Company, a corporation, defendant in the above entitled cause, conceiving itself aggrieved by the Judgment entered against it and in favor of the plaintiff on the 11th day of January, 1912, and the rulings and instructions in said cause made, as set forth in the Assignment of Errors, petitions said Court for an order allowing said defendant to prosecute a Writ of Error to the Honorable United States Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith, under and according to the rules of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon giving such security, all further proceedings in this court be suspended and staid until the determination of said Writ of Error by the United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises, defendant alleges manifest error has happened, to the great damage of

the Pacific Hardware and Steel Company, defendant herein ;

That defendant has filed herewith Assignment of Errors, upon which it relies and will urge in the Appellate Court:

WHEREFORE, Defendant prays that a Writ of Error issue herein, and that a transcript of the records, proceedings, papers and all things concerning the same, upon which said Judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said Judgment be reversed, and that defendant recover judgment as demanded in its answer.

PLATT & PLATT,
PALMER L. FALES,
Attorneys for Defendant.

UNITED STATES OF AMERICA

District of Oregon—ss.

Service of the within petition by certified copy thereof is thereof acknowledged at Portland, Oregon, this 2nd day of February, 1912.

HENRY ST. RAYNER,

Of Attorneys for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed February 2, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, an order allowing Writ of Error in words and figures as follows, to-wit:

[Order Allowing Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff.

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

The defendant, Pacific Hardware & Steel Company, having this day filed its petition for a writ of error from the decision and judgment made and entered hereon on the 11th day of January, 1912, and the rulings and instructions made therein, to the United States Circuit Court of Appeals in and for the Ninth Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon said Writ of Error, and that, upon the giving of said security, all further proceedings of this court be suspended and stayed, and execution recalled until the determination of said Writ of Error by said United States Circuit Court of Appeals for the Ninth Circuit,.....and said petition having this day been duly allowed;

Now, Therefore, it is ordered that, upon said defendant, Pacific Hardware & Steel Company, filing with the clerk of this court a good and sufficient bond in the sum of ten thousand dollars, to the effect that if the said defendant, Pacific Hardware & Steel Company, shall prosecute the said Writ of Error to effect and answer all damages and costs if it fails to make

its plea good, then the said application to be void; otherwise to remain in full force and virtue, the said bond to be approved by the Court,—that all further proceedings in this court be, and they are hereby, suspended and stayed and the execution heretofore issued herefrom be recalled until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

CHAS. E. WOLVERTON,

Judge.

Dated this 2nd day of February, 1912.

[Endorsed]: Order. Filed February 2, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, a Bond on Writ of Error in words and figures as follows, to-wit:

[Bond on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Pacific Hardware & Steel Company, a corporation, principal, and Fidelity & Deposit Company of Maryland, a corporation, surety, are held and firmly bound unto Alonzo L. Monical, the above

named defendant, in the sum of ten thousand dollars, to be paid to the said Alonzo L. Monical, his executors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors or assigns, firmly by these presents.

Sealed with our seals and dated the 2nd day of February, 1912.

Whereas, the above named Pacific Hardware & Steel Company, a corporation, is prosecuting a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon, entered on January 11, 1912.

Now, the consideration of this obligation is such that if the above named Pacific Hardware & Steel Company shall prosecute said Writ of Error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

PACIFIC HARDWARE & STEEL COMPANY,

By Platt & Platt and Palmer L. Fales, its Attorneys of Record.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND,

By Robert F. Platt, Attorney in Fact.

By W. J. Clemens, Agent.

Examined and approved, this 2nd day of February, 1912.

CHAS. E. WOLVERTON,

District Judge.

[Endorsed]: Bond. Filed February 2, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, an Assignment of Error in words and figures as follows, to-wit:

[Assignment of Error.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL, Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

**ASSIGNMENT OF ERROR ON WRIT OF
ERROR.**

COMES NOW defendant above named, by Platt & Platt and Palmer L. Fales, its attorneys of record, and says that the judgment in the said cause is erroneous and against the just rights of said defendant and thereunder concerning sets forth the following assignments of error, which it avers occurred upon the trial of the cause, in connection with its petition for Writ of Error:

I.

Because the above entitled court erred in denying and not sustaining the defendant's motion at the close of plaintiff's testimony for a non-suit, on the ground that the premises where the said accident set forth in the complaint, which is the basis of plaintiff's cause of action, took place was private property, and that the

defendant's servant was thereupon as an invited person pursuant to contractual relations between the defendant and the East Side Boiler Works, a tenant of the owner of said private roadway, whereas the plaintiff was thereupon uninvited and without any contractual relations with any owner or tenant of said premises, and entirely upon his own private business, and there was no testimony in the case showing the existence of any wanton or wilful neglect on the part of said defendant's servant in causing said accident.

II.

Because the above entitled court erred in overruling and not sustaining defendant's motion for a directed verdict in favor of the defendant, at the close of the taking of all testimony in said cause on the ground and for the reason that the premises where said accident set forth in the complaint, which is the basis of plaintiff's cause of action, took place was private property, and that the defendant's servant was thereupon as an invited person pursuant to contractual relations between the defendant and the East Side Boiler Works, a tenant of said private roadway, whereas the plaintiff was thereupon uninvited and without any contractual relations with any owner or tenant of said premises, and entirely upon his own private business, and there was no testimony in the case showing the existence of any wanton or wilful neglect on the part of said defendant's servant in causing said accident.

III.

Because the above entitled court erred in declin-

ing and refusing to instruct the jury as requested by the defendant at the close of all of the testimony as follows: "You are instructed that the roadway leading from East Water Street west, upon which this accident took place, is, under the testimony, a private roadway. You are further instructed from the evidence that the plaintiff, at the time of the accident was upon said private roadway upon his own personal business. You are further instructed that the defendant's servant, Harry Kelly, was upon said private roadway as an invited person, pursuant to contractual relations between the defendant and the East Side Boiler Works, a tenant of the owners of said private roadway. You are further instructed that, under such circumstances, the defendant is not liable in damages for the injuries complained of unless its servant, Harry Kelly, was guilty of wilful or wanton negligence towards the plaintiff. You are further instructed that, the complaint not charging that the defendant's servant was guilty of wanton or wilful negligence, the plaintiff cannot recover in this action, and your verdict must be for the defendant."

IV.

Because the above entitled court erred in, after instructing the jury that the premises upon which said accident took place was private property, instructing them that they should consider as a matter of fact to what extent the public were allowed to use it, and if they found that the public were allowed to use it, without objection on the part of the owners thereof, then the defendant's servant was liable to the plain-

tiff, if in the use of it made by the defendant's servant, he did not exercise ordinary care to avoid injury to the plaintiff.

PLATT & PLATT and PALMER L. FALES,
Attorneys for the Defendant.

UNITED STATES OF AMERICA,

District of Oregon—ss.

Service of the within assignments of error by certified copy thereof is hereby acknowledged at Portland, Oregon, this 2nd day of February, 1912.

HENRY ST. RAYNER,
Of Attorneys for Plaintiff.

[Endorsed]: Assignments of Error. Filed February 2, 1912.

A. M. CANNON.

Clerk.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, a Writ of Error in words and figures as follows, to-wit:

[Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Ninth Judicial Circuit—ss.

The President of the United States.

To the Honorable Judge of the District Court of the United States for the District of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of you, be-

tween Alonzo L. Monical, plaintiff, and Pacific Hardware & Steele Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Pacific Hardware & Steel Company, defendant, as by its answer appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do ~~command~~ you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit, on the 3rd day of March next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 2nd day of February, A. D., 1912, and in the one hundred thirty-sixth year of the independence of the United States of America.

Allowed by

CHAS. E. WOLVERTON,

U. S. District Judge.

Attest:

A. M. CANNON,

Clerk of the District Court of the United States
(Seal.) for the District of Oregon.

[Endorsed]: Writ of Error. Filed February 2, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 2 day of February, 1912, there was duly filed in said Court, a Citation on Writ of Error in words and figures as follows, to-wit:

[Citation on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL, Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

CITATION TO DEFENDANT IN ERROR.

UNITED STATES OF AMERICA—ss.

To ALONZO L. MONICAL:

GREETING.

WHEREAS, the Pacific Hardware & Steel Company, a corporation, defendant above named, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment lately entered in the District Court of the United States for the District of Oregon, made in favor of you, the said Alonzo L. Monical, and has filed the security required by law, you are therefore hereby cited to appear before said United States Circuit Court of Appeals at the City of San Francisco, on the 3rd day of March, 1912, next, and to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Circuit this 2nd day of February, A. D., 1912.

CHAS. E. WOLVERTON,

Judge of the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

District of Oregon—ss.

Due service of the within Citation to defendant in error by certified copy thereof, as by law required, is hereby acknowledged at Portland, Oregon, this 3 day of February, 1912.

HENRY ST. RAYNER,

Of Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: Citation. Filed February 2, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 7 day of February, 1912, the same being the Judicial day of the regular November, 1911 Term of said Court; present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

ALONZO L. MONICAL,

Plaintiff,

vs.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

Now, at this time, for good cause shown, it is ordered that defendant's time for filing the transcript of record and docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby enlarged and extended to and including the 1st day of June, 1912.

CHAS. E. WOLVERTON,
Judge.

Dated at Portland, Oregon, this 7th day of February, 1912.

And afterwards, to-wit, on the 17 day of May, 1912, the same being the Judicial day of the regular November, 1911 Term of said Court; present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

May 17, 1912.

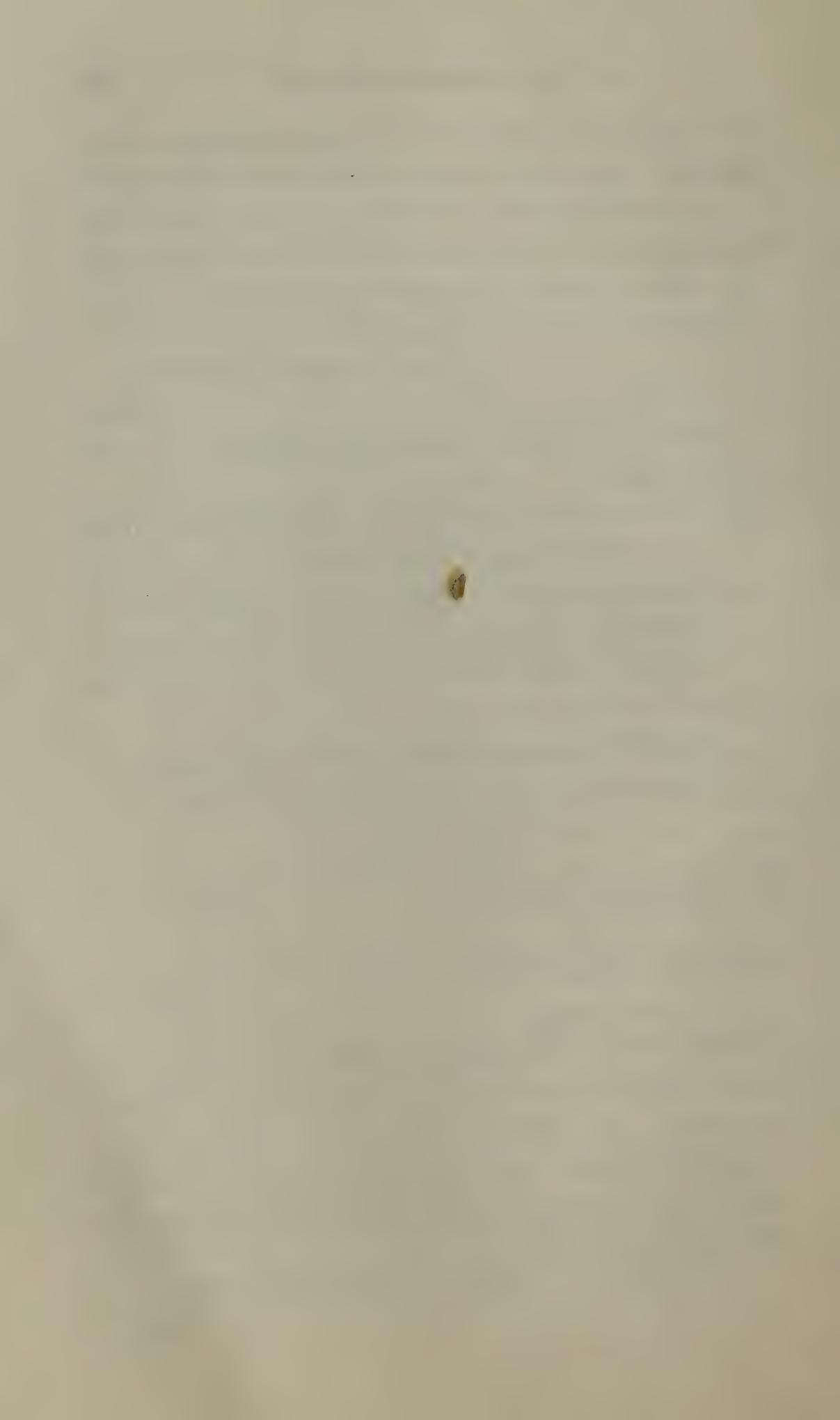
ALONZO L. MONICAL, Plaintiff,

VS.

PACIFIC HARDWARE & STEEL COMPANY, a
corporation, Defendant.

Now, at this day, for good cause shown, it is ordered that defendant's time for filing the record and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 15 day of July, 1912.

CHAS. E. WOLVERTON,
Judge.



IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

PACIFIC HARDWARE and STEEL COM-
PANY, a Corporation,
Plaintiff in Error,

v.

ALONZO L. MONICAL,
Defendant in Error.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

This is an action for damages resulting from personal injuries sustained by the defendant in error as a result of a collision between his body and an auto truck of the plaintiff in error.

COMPLAINT

The material allegations of the complaint, upon which evidence was introduced and upon which defendant in error relied at the trial, charged that on the 25th day of March, 1911, the defendant in error was standing against the wooden railing on the North side of a roadway running from Water Street to Sup-

ple's Dock, situated on the East side of the Willamette River in the City of Portland, and that while the defendant in error was so standing and was then and there engaged in talking to one Captain John Nelson, the plaintiff in error, by its servant, Harry Kelly, carelessly and negligently operated and ran its auto truck, which was then engaged in its business and while loaded with several bars of angle iron about thirty (30) feet in length and which protruded behind said auto truck along said roadway from Water Street in the direction of Supple's Dock, and when passing the defendant in error the plaintiff in error, by its said servant, carelessly and negligently omitted to ring a bell, blow a horn, or whistle or sound a gong and without giving any signal or warning, carelessly and negligently operated and turned said auto truck towards the Southwest on said roadway at a high, dangerous and unsafe rate of speed with the intention of passing through a certain gateway or opening about Sixteen (16) feet in width on the South side of said roadway, known as the entrance from said roadway to the premises of the East Side Boiler Works, the East side of said gateway or opening being on a line about twenty-two (22) feet west of the place where the plaintiff was standing as aforesaid, and the defendant thereby, while so operating and running said auto truck by said servant, without any fault or negligence on the part of the plaintiff, carelessly and negligently struck the plaintiff with such protruding angle iron in a violent manner and knocked him through said railing and down upon several logs lying a distance about twenty (20) feet below said railing, by reason of which the defendant in error sustained certain specified injuries.

ANSWER

The first separate answer and defense of the plaintiff in error admits that at the time of the accident the said Harry Kelly was the servant of the plaintiff in error and engaged in its business at the time of the accident described in the complaint, and then charges that the roadway described in the complaint was a private roadway and that the said servant of the plaintiff in error with the auto truck was making a delivery of the angle iron to the East Side Boiler Works, lessee of one of the owners of said private roadway, situated on the South side of said private roadway, and that the said servant of the plaintiff in error was driving said auto truck along said private roadway by license and permission from the owner of said private roadway, through said lessee, and was using due care in so doing, and that defendant in error was a trespasser or mere licensee upon said private roadway and was leaning against the railing of the South side of said private roadway engaged in idle conversation, and was not at the time of said accident engaged in any business for himself or any of the owners or lessees of the owners of said private roadway, and that said defendant in error negligently failed to use his natural faculties to protect himself from injury, and that the injuries resulted from said negligence of the defendant in error and not otherwise.

The second separate answer and defense admits that at the time of the accident the said Harry Kelly was the servant of the plaintiff in error and engaged in its business, and then charges that said servant was driving such auto truck along said roadway in a careful and prudent manner and that the defendant in error

negligently and carelessly failed to exercise his natural faculties to protect himself from injury, and that the injury resulted from the said negligence of the defendant in error and not otherwise.

REPLY

In the reply the material allegations of defendant's answer are denied, except as alleged in the complaint.

AMENDMENT TO COMPLAINT

At the trial and before the jury was empaneled, upon order of the trial court the complaint was amended by the addition of a Paragraph, reading as follows:

“That the roadway hereinbefore referred to, on said 25th day of March, 1911, and for several years immediately preceding said time, was used by the public generally as a roadway for vehicles and pedestrians to pass and repass from East Water Street to the wharves and docks known as Supple's Dock and the wharf and premises of the Willamette and Columbia River Towing Company, a corporation. And said roadway, at said time, was constructed upon a public street of the City of Portland, Oregon, known as East Yamhill Street, and was and is a public roadway of the City of Portland, Oregon. And the plaintiff for several years preceding immediately said 25th of March, 1911, had been in the habit of using said roadway, and was, on said day, at the time of receiving said injuries, using the same by the invitation and permission of the City of Portland and of Joseph Supple and the said Willamette and Columbia River Towing Company, the owners of said docks, wharves and premises, and was rightfully there at said time.”

A denial of which paragraph was allowed the plaintiff in error by the court.

The undisputed evidence discloses that from some time prior to the year 1905 to and including the date of the accident described in the complaint, the Willamette and Columbia River Towing Company was the owner of Block seven (7), in East Portland, and that Joseph Supple at the same time was the owner of Block six (6). That these two blocks were bounded on the East by East Water Street and on the West by the Willamette River. That Yamhill Street runs East and West at right angles to East Water Street and was improved only as far as the West line of East Water Street, that is to say: that which would be an extension of Yamhill Street West of the West line of East Water Street and between Blocks six (6) and seven (7), was not improved. And that in the early summer of 1905, the Willamette and Columbia River Towing Company and Joseph Supple and others petitioned the Mayor and Executive Board of the City of Portland for permission to use the extension of Yamhill Street, between Blocks six (6) and seven (7), from the West line of East Water Street to the terminus at the Willamette River, until such time as they were publicly improved. This permission was granted in accordance with the petition and the roadway in question was constructed by Mr. Supple and the Willamette and Columbia River Towing Company. On the North to the East end of South half of the extension of Yamhill Street. This roadway was constructed of planking placed where necessary upon piling driven into the bank and into the bottom of the Willamette River. This plank roadway begins at a point about twenty (20) feet West of the West line of East Water Street and extends in a Westerly direction about 395 feet to Mr. Supple's

Dock. This roadway is about twenty (20) or twenty-one (21) feet wide. Abutting on the South are the buildings owned by the Willamette and Columbia River Towing Company, on the North to the East end of said roadway for a distance of about 228 feet and to a point about twenty (20) feet East of the opening to the East Side Boiler Works, which opening is on the South side of said roadway, was a wooden railing. From this point West there was a gap in the wooden railing for about fifty (50) feet, from which point the wooden railing extended along the North side of said roadway to Supple's Dock. The ground under said roadway is even with the surface of said roadway at its East end, but gradually slopes towards the River so that at the beginning of the gap in the railing the roadway was about eighteen (18) or twenty (20) feet above the surface of the ground.

At the time of the accident the defendant in error, with Captain John Nelson, was leaning against the railing on the North side of said roadway at a point about three or four feet from the end of said railing with the gap in said railing to his left hand, with his back to the roadway, looking North. The point where the defendant in error and said Nelson were standing was about twenty (20) or twenty-two (22) feet East of the East line of the gateway or opening into the East Side Boiler Works. When the auto truck of the plaintiff in error, which had come from East Water Street West along said roadway, swung to the South to make the turn into the East Side Boiler Works, the pieces of angle iron which were protruding from the back end of said auto truck, described an arc, which swept the defendant in

error West along the remaining three (3) or four (4) feet of the railing to the gap in the railing, at which point he plunged to some timbers laying on the ground below and sustained certain personal injuries.

The further undisputed evidence shows that this roadway was constructed by the Willamette and Columbia River Towing Company and Mr. Supple, and maintained and repaired by them and that the City of Portland took no part in building said roadway or in its maintenance or repair, and that the East Side Boiler Works was at the time of the accident a lessee of the Willamette and Columbia River Towing Company. Its plant was located on the South side of said roadway with an opening to said plant on to said roadway about sixteen (16) feet in width, which opening or gateway was about 260 feet West from the West line of East Water Street, and that the angle iron had been ordered by the East Side Boiler Works, with a stipulation that it be delivered by the plaintiff in error to the plant of the East Side Boiler Works, and that the opening or gateway on the South side of said roadway was the only gateway and opening to the East Side Boiler Works through which such delivery could be made, and that at the time of the accident the servant of the plaintiff in error with said auto truck was making such delivery.

The further undisputed evidence discloses that the only enterprises located upon and adjacent to the said roadway and opening off from the same, were as follows: Supple's Dock, located at the West end of said roadway; Dock of the Willamette and Columbia River Towing Company, located along the South side of the roadway to the West of the opening into the East Side

Boiler Works. Opposite to the hereinbefore described opening the East Side Boiler Works, then some stables and sheds owned by the Willamette and Columbia River Towing Company, and further to the East a small sheet metal shop.

At the close of the case for the defendant in error, the plaintiff in error moved the Court for a judgment of non-suit upon two grounds:

First. Upon the ground of contributory negligence in that it appears from the evidence that the defendant in error and the man who accompanied him, placed themselves upon a roadway used by automobile trucks loaded with different classes of merchandise, with their backs to the roadway near an open and broken place in the railing with entire disregard of the ordinary and reasonable care of pedestrians to protect himself from injury.

Second. Upon the ground that the theory of the case of the defendant in error is that the servant of the plaintiff in error did not exercise such reasonable and ordinary care as should be exercised by a driver of such a vehicle in such a place, and that the evidence discloses that the roadway was a private structure constructed by private enterprise for private purposes, and that the defendant in error was a mere licensee while upon said roadway, and that the servant of the plaintiff in error was there upon business with one of the tenants of the owner and therefore stood in the position of the owner, and that under such circumstances it is not sufficient for the defendant in error to prove that the servant of the plaintiff in error did not use reasonable and ordinary care as charged in the complaint, but that the de-

fendant in error must go further than this and show that the servant of the plaintiff in error was guilty of wilful or wanton negligence, or that after seeing the defendant in error in a place of danger he proceeded with reckless disregard of the rights of the defendant in error, and that the evidence introduced by the defendant in error failed to show such reckless disregard or any wanton or wilful negligence or that the defendant in error was seen by the servant of the plaintiff in error, which motion for non-suit was overruled by the Court.

At the close of all the evidence the plaintiff in error moved the Court for a directed verdict in its favor upon the same grounds as were set forth upon the motion for a non-suit at the close of the plaintiff's testimony, which motion for a directed verdict was overruled by the Court.

Thereupon the defendant in error requested the Court to give to the jury the following instructions:

“Gentlemen of the Jury:

“You are instructed that the roadway leading from East Water Street west, upon which this accident took place, is, under the testimony, a private roadway. You are further instructed, from the evidence, that the plaintiff, at the time of the accident, was upon said private roadway upon his own personal business. You are further instructed that the defendant's servant, Harry Kelly, was upon said private roadway as an invited person, pursuant to contractual relations between the defendant and the East Side Boiler Works, a tenant of the owners of said private roadway. You are further instructed that, under such circumstances, the defendant is not liable in damages for the injuries complained of unless its servant, Harry Kelly, was guilty of wilful or

wanton negligence towards the plaintiff. You are further instructed that, the complaint not charging that the defendant's servant was guilty of wanton or wilful negligence, the plaintiff cannot recover in this action, and your verdict must be for the defendant."

which request was refused by the Court.

After the Court instructed the jury the plaintiff in error excepted to the court's submitting to the jury as a question of fact, the question as to whether this structure was a private way or whether it was a semi-public way, and the failure of the Court to rule on that as a proposition of law.

SPECIFICATIONS OF ERROR

The errors relied upon by the plaintiff in error, are:

First. In denying and not sustaining the defendant's motion, at the close of plaintiff's testimony, for a nonsuit.

Second. In overruling and not sustaining plaintiff in error's motion for a directed verdict in favor of the plaintiff in error.

Third. In declining and refusing to instruct the jury as hereinabove set forth.

Fourth. In submitting to the jury as a question of fact, the question as to whether this was a private or semi-public way, and the failure of the Court to rule on that as a proposition of law, which instruction was as follows:

"You will understand that the roadway was constructed over a part of Yamhill street, but that makes no difference in this case, because permission was

obtained from the City Council, or the proper committee, for constructing this private way, and it was constructed by private enterprise and so maintained by private enterprise. But you are to determine whether or not it was used for something more than a private way—whether or not the public generally have become accustomed more or less to use and to be about and upon this way, and to use it in the way of a public highway; and then you will determine to what extent it has been so used. And if you find that it has been used for larger purpose than a mere private way, then that will have a bearing upon your findings as to the negligence in this case.

* * * * *

“If you find that this driveway was something more than a mere private way, that is, one used to a more or less extent by others than the owners and tenants and licensees, or by the public in a more or less general way, and that the plaintiff was rightfully thereon, either by permission or license, or as licensee, or as one of the general public, and the defendant’s servant Kelly was negligent in so propelling his truck, without giving warning or notice of its approach, as to shove the plaintiff off the driveway and injure him, then the defendant would be liable, unless you further find that the plaintiff was himself guilty of negligence which contributed to his own injury.”

(Transcript of Record, pp. 305-6-7.)

POINTS AND AUTHORITIES

I.

Actionable negligence is failure to discharge a legal duty to the person injured. If there is no duty there is no negligence.

II.

The owner of private property, or one standing in his position is under no obligation to keep it in a safe

condition for the benefit of trespassers, intruders, idlers, bare licensees or others who come upon it, not by any invitation express or implied, but for their own purposes, pleasures or to gratify their curiosity however innocent or laudable their purpose may be.

1 Thompson on Negligence, Sec. 946,
Hargreaves vs. Deacon, 25 Mich. 1.

III.

There is no duty of exercising reasonable care towards a trespasser or mere licensee upon private property, or to anticipate his presence or to keep a lookout for him. The only duty is to refrain from wilful or wanton injury to him or to use reasonable care to prevent injury to him after discovering his danger.

Ward vs. Southern Pacific Railway Co., 25
Ore. 433,

Reardon vs. Thompson, 149 Mass. 267; 21 N.
E. 369,

Welch vs. Railroad Co., 145 N. Y. 301,

Knight vs. Lanier, 74 N. Y. Supp. 999,

McCann vs. Thileman, et al, 72 N. Y. Supp.
1076-7,

Downs vs. Elmira Bridge Co., 58 N. Y. Supp.
628,

III Elliott on Railroads, Secs. 1250 and 1251,
White on Personal Injuries, Sec. 860.

IV.

An invitation or license to the public to use a private way will not be implied from the fact that the owner has passively permitted others to use it as such, but in order to imply such an invitation the use must have been definite, long, open, continuous and upon business or pleasures disconnected with the private way.

Felton vs. Aubery, 74 Fed. 350,
 Sweeny vs. Old Colony & Newport R. R. Co.,
 10 Allen 368,
 Sutton vs. N. Y. C. & H. R. R. Co., 66 N. Y.,
 243,
 Ill. Central R. R. Co. vs. Godfrey, 71 Ill. 500;
 22 Am. Rep 112,
 Akers vs. Chicago St. P. M. & O. Ry. Co.,
 (Minn.) 60 N. W. 699,
 Blanchard vs. Lakeshore & M. S. R. R. Co., 126
 Ill. 416; 18 N. E. 799.

V.

An individual as distinguished from the public to be an invitee as distinguished from a mere licensee, must come upon the property, for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. No invitation is implied in the absence of mutual interest.

Watts vs. Jensen, 86 Fed. 658,
 Bennett vs. Louisville & N. R. R. Co., 602 U. S.
 577; 26 L. Ed. 235,
 Pauckner vs. Wakum, 231 Ill. 276,
 Plummer vs. Dill, 156 Mass. 426; 31 N. E. 128,
 III Elliott on Railroads, Sec. 1250,
 White on Personal Injuries, Sec. 872.

VI.

The owner owes to invited persons the duty of using reasonable or ordinary care only to the extent of and for the purposes of the invitation. When the invited person steps aside from the purpose or extent of the invitation, he then becomes a mere licensee.

Flannigan vs. Alcatraz Paving Co., 56 N. Y.
 Supp. 18,
 Kennedy vs. Chase, 119 Cal. 637; 52 Pac. 33,

Pierce vs. Whitcomb, 48 Vt. 127,
 Schmidt vs. Bauer, 80 Cal. 565; 5 L. R. A. 580,
 Walker vs. Winstanley, 155 Mass. 301; 29 N. E.
 518,
 Armstrong vs. Medbury, 67 Mich. 250; 34 N. W.
 566,
 I Thompson on Negligence, Sec. 990.

VII.

Whatever relation defendant in error bore to the premises, it was incumbent upon him to use due care to protect himself from injury, and a failure in this precludes him from recovery.

Massey vs. Seller, 45 Ore. 267.

ARGUMENT

An examination of the evidence introduced by the defendant in error discloses that the roadway in question was constructed and maintained by private enterprise over an unused and unimproved portion of a public street. (The evidence introduced by the defendant discloses that this roadway was constructed under a permit from the City, granting the builders the right to use the street end for private purposes.) The roadway led to the private dock of Mr. Joseph Supple and to the private enterprise of the Willamette and Columbia River Towing Company, and to the East Eide Boiler Works, and a small sheet metal works. So far as the testimony introduced by the defendant in error shows, these were the only enterprises located upon or adjacent to said roadway. This roadway terminated at its West end at Supple's Dock. As the testimony hereinafter quoted shows, vehicles and pedestrians on this roadway could go to no other place except to the enterprises hereinbe-

fore mentioned, for whose accommodation the roadway was constructed. Paragraph VII of the Answer (Page 23, Transcript of Record), alleges, and Paragraph I of the Reply, (Page 35, Transcript of Record), expressly admits that the defendant's servant was upon the roadway at the time of the accident, making a delivery of angle iron to the East Side Boiler Works, the lessee of the Willamette and Columbia Towing Company, one of the owners of the roadway.

To establish his cause of action, it was incumbent upon the defendant in error to prove that this was a public roadway or that he was, at the time and the place of the accident, upon the roadway by right. It is clear that he not only failed to show that it was a public roadway, but his evidence shows that it was a private roadway.

For him to show that he was upon this private roadway by right, it was incumbent upon him to show that he was there by invitation, express or implied, from the owners or occupants of the premises. For him to show that he was there by invitation it was necessary for him to prove:

First. That the public had so extensively used it as to imply a license from the owner to all members of the public to so use it, under which circumstances his individual purpose upon the roadway would be immaterial, or

Second. For him to prove that an invitation, express or implied, had been extended to him as an individual by the owner or occupants, in which event the extent of the use by the general public would be immaterial.

As to the first, such an invitation to the public will not be implied from the fact that the owners permitted other members of the public to use the roadway for their own purposes.

Felton vs. Aubrey, 74 Fed. 350-357, was an action by a boy nine years old, appearing by his father as next friend, for personal injuries received through the alleged negligence of the defendant in running its train upon him without keeping a lookout and without ringing any bell or giving any other signal. As set forth in the statement of the case, the evidence tended to show that the defendant in error sustained his injury at a place where one of the railroad company's tracks crossed an open common upon a high embankment, from twenty to twenty-five feet above the level of the common. There was evidence that the track was frequently crossed by people crossing the common who used the common as a pasture for grazing cattle. At the time the boy was injured he was upon the track looking for his cows. There was a verdict for the plaintiff, and the defendant company appealed. It was insisted by the company that the boy was a trespasser upon the track and that it owed him no duty until his presence was discovered, and requested the Court to instruct the jury that the plaintiff was a trespasser, and that they must find for the defendant, unless the jury should believe from the evidence that the presence of the plaintiff on the tracks was known to the servants of the defendant in charge of its train before the plaintiff was injured, and that after such presence became actually known, the defendants could have avoided injuring the plaintiff by the exercise of ordinary care, which degree of care they failed to exercise, and by reason of such failure plaintiff

received the injuries complained of, in which event the jury should find for the plaintiff. This request was declined.

Discussing the rule of law as to the necessity of anticipating presence of trespassers and licensees upon private property, the Court, speaking through Judge Lurton, said:

“It need not anticipate presence of such intruders upon its general track or in its strictly private yards. This principle has been so frequently announced by the courts of this country, that it seems needless to consider the ground upon which the general rule rests.

* * * In all such cases the rule seems to be that by merely suffering or permitting said voluntary use the owner of the premises comes under no obligation that his premises are either fit, safe or suitable, or that they will remain so. Such a naked licensee accepts the privilege subject to all risks growing out of the condition of the premises. * * * It therefore comes under no duty to a trespasser until his presence and danger are observed, but if it has permitted the public for a long period of time to habitually and openly cross its track at a particular place or use the track as a pathway between particular localities, it cannot say that it was not bound to anticipate the presence of such persons on its track, and was therefore not under obligation to operate its trains with any regard to the safety to those there by its license.

* * * If the evidence shows that the public had for a long period of time customarily and constantly, openly and notoriously crossed the railway track at a place not a public highway, with the knowledge and acquiescence of the company, a license or permission by the company to all persons to cross the track at that point may be presumed. * * * To establish such an implied license it is essential that the use shall have been definite, long, open and continuous. The mere fact that a railway track is frequently used

as a walkway or frequently crossed and that no active steps were taken to stop them would not justify the presumption of a license.”

A new trial was granted by the appellate court because of the failure of the judge to give a requested instruction in regard to the duty of care towards a child as distinguished from an adult, which matter was discussed by the court prior to the discussion of the point here in question. Calling attention to this, the Court said:

“The evidence touching the customary and continuous use by the public of this embankment as a crossing place was exceedingly meager, and we are not prepared to say that on the testimony in this record the court would not have been justified in assuming the defendant in error to have been a trespasser and charging the jury upon that theory exclusively. In view, however, of the possibility that but slight attention was given to this branch of the case, and of the fact that a new trial must be granted, we express no opinion upon the weight of the proof, nor the allied questions raised by the refusal of the court to instruct for the plaintiff in error or to give the charge requested based upon the assumption that the defendant in error was a trespasser.”

Akers vs. Chicago St. Paul M. & O. Ry. Co., (Minn.) 60 N. W. 699. The plaintiff who had that morning quit the employ of the defendant company, was injured because of having caught his foot in an unprotected “frog” in the yards of the company while walking therein upon business of his own. There was evidence introduced that the yards had been made use of by various members of the public for their own convenience without objection by the defendant. The appellate court said:

“Under the facts the deceased was a trespasser (in the legal sense of that term), on the premises and the defendant owned no duty to keep the frog blocked so as to make the yard a safe place in which to travel. Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty there is no negligence. Even if a defendant owes a duty to some one else but does not owe it to the person injured, no action will lie. The duty must be due to the person injured. * * * The fact that the deceased had once been in the employ of the defendant when his duties required him to go upon these tracks, is wholly immaterial. His employment and with it defendant’s duty to him as its servant had terminated. Therefore, at the time of the accident he stood in precisely the same position as any one of the public who had never been in the defendant’s employ. * * * The mere passive sufferance on the part of the defendant of the use of its yard by people in the manner already stated, for the purpose of their own convenience, did not under the circumstances imply any representation upon its part, that they were fit for use or involve it in any liability for their unfitness for such use. * * * Whenever the owner or occupant, in the absence of malice, has been liable because of the unsafe condition of his premises according to every well considered case, ‘The gist of the liability consists in the fact that the person did not act merely for his own convenience and pleasure and from motives to which no act of the owner or occupant contributed, but that he entered upon the premises because he was led to believe that they were intended to be used by visitors and passengers, and that such use was not acquiesced in by the owner or person in possession, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be used. There was on the part of the defendant no invitation, express or implied, to the public to walk on these tracks, and no representation, express or implied, that they were intended for or adapted to any such use, and hence as

to such public, including the deceased, it owed no duty to keep the frog blocked.”

In the case of *Ward vs. Southern Pacific Railway Co.*, 25 Ore. 433, in which a child was injured on the track of the company, not at a public crossing, the court held that a railroad company has the right to the exclusive use of its tracks, unless a right-of-way or foot path over it has been acquired by its consent, express or implied, or a joint use has been reserved to the public as at a public crossing, and said:

“But the mere fact that persons have frequently trespassed upon the track and that the company has resorted to no means to stop such trespass, does not amount to a permission or license to use the track as a foot path. * * * Nor the fact that people may have frequently used the track to walk on, change the law or render their act less unlawful.”

And then laid down the rule that a railroad owes no duty of keeping a lookout for persons on its track. And that failure to discover the trespasser is not negligence.

McCann vs. Thileman, et al, 72 N. Y. Supp. 1076-7, was an action against a contractor for injuries sustained while proceeding along a foot path across a vacant lot owned by a third person from whom the defendant had obtained permission to store a part of his equipment. The plaintiff fell into a hole about three feet deep. The evidence was that the plaintiff had used this path before any equipment was stored there by the defendant and had used it in the morning of the day of his injuries, at which time no hole existed. The owner testified that it had been used by the public “without objection.” The defendant requested the court to charge that plaintiff

had used the path by the mere gratuitous permission of the owner and that he was obliged to take the path as he found it, and could not hold the owner, or these defendants, standing in the place of the owner, to exercise any care, ordinary or otherwise. In reversing the judgment for the plaintiff and ordering a new trial, the appellate court said:

“This refusal by the court to charge as requested by the defendant’s counsel was plainly error. ‘The habitual use of a footpath across the lot of the defendants for many years without objection warrants a finding of a license from the defendants to cross said land by said footpath.’ *Driscoll v. Cement Co.*, 37 N. Y. 637. The plaintiff herein had no permission from the owner to use the path. He had no legal right to use it. The fact that he and others crossed ‘without objection’ constituted him a mere licensee only. Neither was an implied invitation extended him to cross by reason of the continued use thereof by the public. The failure to prohibit the use of the strip was not an invitation to use it. *Galligan v. Mfg Co.*, 143 Mass. 527, 10 N. E. 171: ‘Permission * * * gives no right. If I avail myself of permission to cross a man’s land, I do so by virtue of a license, not of right. It is an abuse of language to call it a right. It is an excuse or license, so that the party cannot be treated as a trespasser.’ *Martin, B. in 7 Hurl & N.* 745. ‘Where, however, one enters upon the premises of another as a mere licensee, without inducement or enticement, he does so at his own risk.’ *Sterger v. Van Sicklan*, 132 N. Y. 499, 16 L. R. A. 640. *Larmore v. Iron Co.*, 109 N. Y. 391; 4 N. E. 752. ‘The inducement must be equivalent to an invitation, either express or implied. Mere permission is not sufficient.’ *Carleton v. Steel Co.*, 99 Mass. 216. *R. v. Griffin*, 100 Ind. 221.

“In a case quite similar to the one at bar, the Court said: ‘The deceased at the time of his death was upon the defendant’s land without any invitation from the

defendant, either express or implied, and without legal right. Many other persons, it is true, were in the habit of passing over said land of their own notion and for their own convenience, and it does not appear that any objection to their so doing was ever raised by the defendant, but these facts, at the utmost, only raise an implication of a license to the deceased to do the same thing, but gave him no right beyond a mere license.' *Sweny v. R. R. Co.*, 10 Allen, 368. 'A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability.' *Id.* 'He goes at his own risk, and enjoys the license subject to its concomitant perils.' *Hargreave v. Dekum*, 25 Mich., 1. 'An open hole in the earth, which is not concealed otherwise than by the darkness of the night, is a danger which a mere licensee going upon the land must avoid at his peril.' *Reardon v. Thompson*, 149 Mass. 267; 21 N. E. 369.

"This rule is subject to some qualifications—such, for instance, as where the owner has set spring guns or other instruments of destruction upon his grounds without notice, or where dangerous pitfalls are so near a public highway that, combined with the ordinary incidents of travel, they result in injury to persons passing along the highway, but none of these exceptions apply to the case at bar. In *Beck v. Carter*, 68 N. Y., 263, cited by plaintiff's attorney, and relied upon by the general term in confirming the judgment herein, recovery was allowed because, by use long continued, the land where the accident occurred had been made, for the time being, a public place and a part of the highway. *Morris v. Brown*, III N. Y., 329; 18 N. E., 722. The plaintiff's right, therefore, was to be protected from wanton and wilful injury, but beyond this the defendants, who had express authority from the owner to make use of the lot for the purposes of their work, owed him no obligation. *Downs v. Bridge Co.*, 41 App. Div. 339; 28 N. Y. Supp. 628. The refusal to charge as aforesaid was, therefore, an error, and this alone would require the order of a new trial."

In *Illinois Central R. R. Co. vs Godfrey*, 71 Ill. 500, the Court said:

“At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.”

In this case there was evidence that persons had been in the habit of passing and re-passing on foot past the point of the accident for a number of years, without objection by the company.

In *Sutton vs. New York Central R. R. Co.*, 66 N. Y. 243, the plaintiff was injured while crossing the track and going to his work at a foundry. The defendant had permitted workmen to cross the track at that place habitually and such was the nature of the license relied upon by the plaintiff, but of such persons the Court said:

“It owed them no duty to guard them from accident—no duty of active vigilance.”

In *Glass vs. Memphis and C. R. Co.*, 90 Ala. 481; 10 So. 215, the plaintiff was walking on the track of the defendant. There was evidence of a custom in the general public so to do. The court held that such evidence was irrelevant and the fact that the persons living in the neighborhood were accustomed to walk upon the track without objection by the company, does not make them any the less trespassers, also holding that the defendant was not liable unless wantonly and wilfully negligent, which negligence cannot be inferred without actual knowledge of the trespassers' presence, saying:

“And this doctrine applies as well to densely populated neighborhoods in the country and to the streets

of a town or city as to the solitudes of the plains or forest."

There are many cases in which the courts have held that the facts established a license in the general public to use the private property of the defendant for the purpose of a foot path, and that where such license existed there was a duty upon the owner or occupant of the property to exercise reasonable care to protect the public and individual members thereof. However, an examination of these authorities discloses that in all instances there was evidence that the use of the foot path by the public was definite, long, continuous and extensively used upon business entirely disconnected with the purposes for which the property was used. That is to say: That the public extensively used the private way for its own convenience and upon business entirely disconnected with the owner or occupants of the private way.

To instance a few of these cases:

Sweeny vs. Old Colony & Newport, 10 Allen 368, in which case the crossing was actually constructed by the company and a flagman maintained at that point, which flagman told the plaintiff that it was safe to cross. The court held that this was more than permission and amounted to a definite invitation.

In *Swift vs. Staten Island R. R. Co.*, 123 N. Y. 645, (25 N. E. 378), a path extended across the railroad track from a door in the fence, which was used by the inhabitants in the neighborhood generally for the purpose of depositing ashes and garbage in barrels kept on the opposite side of the track and to reach a highway, ferry and store building beyond. This path had been

used for such purposes for many years with the knowledge and permission of the company.

In *Barry vs. New York Central R. R. Co.*, 92 N. Y. 289, the Court said:

“It is undisputed that the owners of land abutting on the railroad at this point had a right-of-way across the defendant’s tracks and that for more than *thirty years* the public were in the habit of crossing the defendant’s tracks at this point to reach Madison and other streets lying Northerly and Easterly of the railroad, the proof being that several hundred people crossed there every day. There can be no doubt that the acquiescence of the defendant after so long a time in crossing of the tracks by pedestrians amounted to a license and permission by the defendant to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant in respect of persons using the crossing to exercise reasonable care in the movement of its trains.”

In *Byrne vs. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362; 10 N. E. 539, an alley crossing the track was used by the public for many years.

In *Davis vs. Chicago and N. W. Ry. Co.*, 56 Wis. 646; 17 N. W. 406, the plaintiff was traveling along a beaten path, which had been used by the public for twenty years. The Court said:

“We agree with the learned counsel for the Railway Company that the use of the right-of-way for the purpose of passage by individuals occasionally even with the knowledge of the company, should not be construed into an acquiescence in such use by the company simply because it did not expressly object to such use or otherwise warn the people from making use of its right-of-way, but in this case the proof shows more than occasional use, it tends to show a

constant use daily for twenty years or more without any protest or objection on the part of the company. We think from such a constant and continued use a jury might well say that such use was with the acquiescence of the company."

In *Mason vs. Chicago St. P. M. & O. Ry. Co.*, (Wis.), 61 N. W. 300, a well beaten foot path was used frequently and continuously by the public for years in going to and from each others' houses, and by children going to and from school.

Cederson vs. Oregon Navigation Co., 38 Ore. 343-59-71, is a case of this character in which the question is discussed at some length by Judge Wolverton, then Associate Justice of the Supreme Court of this State. In this case the plaintiff while passing along the roadway beside the track of the defendant was injured by the derailing of one of defendant's trains. The plaintiff contended that he was there by invitation of the defendant and hence of right. The defendant contended that the plaintiff was a trespasser on its right-of-way and that it owed to him no duty of reasonable care and active vigilance, and at the close of the plaintiff's testimony moved the court for a non-suit, which was refused, from which refusal the defendant appealed.

In passing upon this question, after reviewing and quoting from *Ward vs. Southern Pacific Co.*, 23 Ore. 433; *Illinois Central R. R. Co., vs. Godfrey*, 71 Ill. 500; *Sutton vs. New York Central R. R. Co.*, 66 N. Y. 243; *Reardon vs. Thompson*, 149 Mass. 267, and others, ^{Judge Wolverton} at pages 361-362, said:

"Tacit consent, or passive acquiescence, appears to be the essential, characteristic, elemental feature which distinguishes a mere licensee from a trespasser

or stranger. So it seems that a naked license to pass over an estate will not create a duty nor impose an obligation on the part of the owner or person in possession to provide against the danger of accident.

“Where, however, the license or privilege is created, not by tacit assent, but by substantial inducement, held out either expressly or by implication by the owner of the premises, then the obligation arises to see that they are in safe condition, and suitable for the use designed, and liability ensues for a breach thereof. Says Mr. Chief Justice Biglow, in *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 368 (87 Am. Dec. 644): ‘A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he, directly or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.’

“Thus we have illustrated the distinction in the books between a mere naked or bare license and that of the ‘more substantial privilege or license which draws with it the obligation to provide against danger of accident, as well as to see to it that no positive act is done to produce injury. These two conditions run into each other by easy imperceptible gradation, and it is not infrequently a difficult thing to determine where the one begins and the other ends. Every case is dependent, in a great measure, upon its own attendant and peculiar facts and circumstances.’ ”

Citing *Sweeny vs. R. R. Co.* (supra), *Murphy vs. Boston & A. R. Co.*, 133 Mass. 121; *Swift vs. Staten Island R. R. Co.*, 123 N. Y. 645; *Barry vs. New York Central R. R. Co.*, 92 N. Y. 289; *Byrne vs. N. Y. C. R. R. Co.*, 104 N. Y. 362; and others, as illustrative of the “more substantial privilege or license which draws with it the obligation to provide against danger from accident

as well as to see to it that no positive act is done to produce injury.”

As before suggested in each of these cases, it is apparent, upon examination, that the *public* had established its right of user by definite, long, open, continuous and extensive use upon business disconnected with the private property of the defendant.

Considering next the facts of this Cederson case, it appears that the railroad track of the defendant, at the time of its construction, occupied the only available space for travel of any kind around the base of a rocky bluff. That from the time of the date of the construction of the railroad up to 1885, the date of the construction of the wagon road, upon which the plaintiff was walking, the travelers going up and down the river and the owners of the cannery property, through which the railroad ran, used the railroad track both as a foot path and for teams and vehicles. That in 1885 Seufert Bros., employers of the plaintiff and owners of the cannery, blasted out the side of the bluff just wide enough for a wagon to travel between the ends of the ties and the bluff, which roadway, constructed on the right-of-way of the defendant with its consent, was used continuously by the owners of the cannery, their employes and others doing business with the cannery, as well as the general public, with the permission and approval of the defendant company. To quote from the court’s review of part of the evidence upon this point, page 367-8:

“It was a first-class road,—a good, clear road,—and a solid track. Anybody going along there could see that it had been traveled. * * * Everybody uses this road who comes along. They travel over that road *between our place and Celilo*. Indians use it, and

we use it, and country people and town people use it. Our employes all use it.' F. Weiler testified that 'in the fishing season a team would go past five or six times a day,—*sometimes fifty times*,,—going up.' Other testimony was adduced showing the manner of the use of the wagon road, and by whom, and of the switches and buildings in close proximity. The decedent's work was generally to the west of the cut, but upon the evening of the accident he was going from the mess house, where he had just had his supper, to the sleeping house, and in doing so was taking the usual route employed by all the men engaged in fishing."

Discussing the sufficiency of this evidence to go to the jury, Judge Wolverton said, page 368-9:

"Upon the whole, we think there was testimony upon which to put the case to the jury touching the question of decedent's right to be upon the wagon road constructed upon the defendant's right of way, and the nature of such right, and by this to determine what duty the company owed the decedent, and, following in its train, the question whether the railroad company exercised due and proper precaution and vigilance to prevent injury to the decedent, under the existing circumstances and conditions. If decedent was a mere trespasser upon the defendant's right of way, or was there by passive acquiescence under a naked license of the company, then it owed him no duty requiring active vigilance for his protection, and it was not restricted thereby in the use of its tracks or cars and appliances in the prosecution of its business; but, if the decedent was there by inducement or invitation of the defendant, there was imposed upon it the duty of active vigilance to avoid injury to him, and upon him, and upon this issue we think there was testimony sufficient to go to the jury. The place of accident was at the junction of the side track, which the company was in the habit of using as a siding, and for setting out and taking on cars for the use of Seufert

Bros. Company in connection with their cannery business. The wagon road at that point was in frequent and constant use by Seufert Bros. Company's employees, both on foot and with teams, especially during the fishing season, and more or less by the general public. This state of affairs continued for a long time, which, taken in connection with the manner in which the wagon road was constructed and its proximity to the side track, tends, in some measure at least, to show that defendant was cognizant of the conditions, and that they so existed with something more than its tacit consent, or, rather, that they existed with its approval. If the decedent was a licensee by invitation or inducement, then it was incumbent upon the defendant to exercise active vigilance in respect to him."

Discussing the distinction between active and passive acquiescence or negligence by commission or omission made by some authorities, he further said, on page 370-71:

"Nor does it occur to us that the nature of the act, whether of omission or of commission, should make any difference in the degree of care, precaution, skill, or vigilance that should be required in a given case. * * * Again, when a person is passing over private premises, without invitation, the owner is not required to even take the precaution to provide against danger of his falling into a pit, or being injured by defective machinery; whereas, if the place be a public one, care must be exercised that a pitfall is not left exposed, or that machinery has not become so out of repair as to be a menace to those having the privilege and right to be about it. So that the quantum of care does not depend upon whether the act is one of commission or omission, but, rather, upon the attendant and surrounding circumstances and conditions, and negligence is the want of due care in any case, measured by the standard suggested."

To sustain the allegations of the amendment to the complaint the Defendant in Error introduced testimony in effect as follows:

ALONZO L. MONICAL—Defendant in Error,

Testified that just prior to the time of the accident he was proceeding West from East Water Street upon this roadway, upon his way through the entrance to the East Side Boiler Works to a ware room of the Willamette and Columbia River Towing Company to get some clothing from a trunk which he had left there with the Company's permission and without pay or consideration, some years before, when he had quit working for that Company.

(Pages 48 and 73, Transcript of Record.)

That he met Captain John Nelson coming from the opposite direction and they together stepped over to the side of the roadway to talk upon matters in no wise connected with the owners, lessees or users of the property connected with said roadway, where they stood with their backs to the roadway about five minutes before the accident. In relation to the use of the roadway this witness testified as follows:

“Q. How long have you been in the habit of going on that roadway and passing over it, Mr. Monical?

A. Ever since it was built. I was working for the Company at the time it was built. They used that—that was put there for use publicly, and everything to come in there, whatever they wanted in *that yard, at the Boiler Works*. People would bring in machinery, go in there to be repaired, come in on that road and go out. There was always vehicles coming in.

Q. To what extent has that roadway been used by the public?

A. For anything what come up that it could be used for—such as cement, he handled cement you know. Stuff such as that.”

(Page 53, Transcript of Record.)

CAPTAIN JOHN NELSON,

Testified that he was returning from an interview with an officer of the tug boat moored at Supple's Dock when he met the Defendant in Error, and in regard to the use of this roadway, testified as follows:

DIRECT EXAMINATION.

Q. What has been the custom in regard to the use of that Dock prior to that time by the public generally, and the roadway?

A. Everybody goes on the Dock that wish to.

Q. Over this roadway?

A. Yes, sir.

Q. Open for everybody?

A. Yes, sir.

(Page 89, Transcript of Record.)

A. What in regards to the boats landing there and so on?

Q. Yes.

A. I have landed there on several occasions.

Q. And passengers—pedestrians?

A. Well, I had no passengers.

Q. I don't mean your passengers but foot passengers going up the roadway?

A. O it is a common thing to see people walking back and forth there.

Q. The public generally go there who want to?

A. Yes sir.

Q. How long has than been going on to your knowledge?

A. Well, most any day you go there you can see somebody walking back and forth. Perhaps they are going down to the boats. There was for quite a while

that the Columbia Contracting Company had two or three boats laying there. Well, there is quite a crew on these three boats, they would be going back and forth at any time.

Q. Just the same as in any other road or street in the City?

A. Yes sir, just the same; no difference at all whatever.

(Pages 90 and 91, Transcript of Record.)

CROSS EXAMINATION

Q. They didn't go in there did they, except to Supple's Dock?

A. O yes, they could, they could go in onto the Willamette and Columbia River Towing Company's Dock or on the boats.

Q. There is no occasion for anybody to go over there unless they have business there at Supple's Dock, or Jones Dock or the East Side Boiler Works, was there? (Jones' Dock synonymous to Willamette and Columbia River Towing Company's Dock.)

A. I don't see why.

Q. It don't go anywhere does it, it goes to the water?

A. You can go out there and get sights of the river front, lots of times a man will take a walk out on the dock that has no particular business.

Q. You don't mean to say that it leads any where else?

A. Yes it leads places. It leads out to the boats that are laying there. Somebody might want to go out and look at the boats.

Q. When you say they go out the same as they do on any other street in the City—

A. They do the same as any other docks.

Q. You are taking about docks now?

A. This was a wharf.

Q. Was it like a street?

A. Just the same as going down on any other dock.

Q. Just like a dock, not like a street is it?

A. It was half a street, isn't it.

Q. Well, is it a street or a dock?

A. While, on that roadway—

Q. Yes.

A. I should think you would call it a street—half a street—a roadway. It is the entrance to the dock.

Q. If you kept on walking you would get into the water wouldn't you?

A. Not unless you fell off the dock, you would do that if you fell off the bridge.

Q. You know it is a dock and not a street. Be fair about it.

A. I know what is a dock?

Q. That structure.

A. I know there is a road to go out to the docks.

Q. A roadway to go onto the docks?

A. Either the Willamette Towing Company dock or the Supple Dock.

(Pages 91 and 92, Transcript of Record.)

DICK TURPIN,

Testified as follows:

Q. Do you know anything about whether the public generally are in the habit of using that roadway?

A. Yes sir, all go out there.

(Page 106, Transcript of Record.)

G. J. SMALE,

Testified as follows:

Q. To what extent has the public been using that roadway, Mr. Smale, to your knowledge?

A. Why as far as my judgment is there is cement docks there and one thing and another they use this roadway going out to it and to the East Side Boiler Works and Jones, and out to the boats that are landing there, tow boats, employees from they go back and forth, and other people. I have been back and forth there myself several times.

Q. Is it open for the public generally?

A. Yes sir, open for the public.

Q. Both vehicles and pedestrians?

A. Nothing to stop them, in fact, the City has sewer pipes laid in from Water Street right along this runway into the River.

(Page 116, Transcript of Record.)

WILLIAM C. COHEN,

Testified as follows:

Q. Do you know anything about whether that roadway has been used by the public generally?

A. It has been since I have been acquainted with the place.

Q. Ever since you have been?

A. Yes.

Q. For what kind of travel?

A. Well, to and from Supple's Dock with all kinds of hauling, and from the Willamette and Columbia Towing Company with all their deliveries of stuff either to and from the boat and for general traffic that would come up off those boats.

(Page 122, Transcript of Record.)

JOSEPH SUPPLE,

Testified as follows:

Q. What has it been used for Mr. Supple, since it was built?

A. A roadway to go out to the River and the docks out there.

Q. And whom has it been used by generally?

A. The public, everybody nobody had any privilege on it as a public dock that is all—public roadway. I got a permit from the City to build it.

(Pages 134 and 135, Transcript of Record.)

Q. And you constructed it for the use of the public and for your own generally, did you?

A. Yes sir.

Q. Then how has it been used since you constructed it Mr. Supple?

A. It has been used for a public roadway to get out to the docks.

(Pages 135 and 136, Transcript of Record.)

Q. And the public all use it?

A. Yes sir.

Q. With your permission

A. Yes, sir.

(Page 136, Transcript of Record.)

CROSS EXAMINATION.

Q. Now in your application for leave to build this roadway, you requested permission from the City to build it for your own purposes didn't you

A. I couldn't say about that.

Q. That was what you were trying to get, was access to your improvements that you either had or intended to make?

A. Yes, yes sir.

(Pages 137 and 138, Transcript of Record.)

Q. Now your dock out there is used as a cement dock is it not?

A. Mostly, yes, sir. We transfer anything over it.

Q. And automobile trucks go back and forth there a great deal to get cement?

A. Yes sir.

Q. And turn into this East Side Boiler Works with material for the Boiler Works?

A. Yes sir.

(Page 139, Transcript of Record.)

MR. E. JONES,

Testified as follows:

That he was Secretary and Treasurer of the Willamette and Columbia River Towing Company, who in company with Mr. Joseph Supple constructed the dock and roadway in question.

Q. What was the purpose of the construction of that roadway and for what has it been used since it was constructed, Mr. Jones?

A. It was to get to the dock and river front.

Q. To the River front?

A. Yes sir.

Q. From the Harbor line to where?

A. To Water Street.

Q. And has it been used by the public since then?

A. Well, the public has been using it, the public was never excluded from it, everybody has the privilege there that wants to go there.

Q. How long have they had that privilege?

A. Ever since it was built.

Q. And have they used it for pedestrians and vehicles generally?

A. No the vehicles haven't any business there, that it; unless they were going to the dock. There is no outlet to it, only if they go out there they have got to come back the same way.

(Page 141, Transcript of Record.)

Court: That way was built for the purpose of giving access to your dock, or to Suple's dock there, was it not?

A. Yes sir, we had a private roadway of our own, but the roadway was wearing out and we didn't care about re-building it and maintaining two, so we helped Supple build this roadway.

Court: Well, the purpose was to give access to your dock?

A. Yes sir.

Court: After it was built it was opened up to the Street?

A. Yes sir.

Court: And then you allowed the use of it to such vehicles or people that desired to go in to your dock?

A. Yes sir.

Court: And passing in and out by that way?

A. Yes sir.

(Pages 142 and 143, Transcript of Record.)

Q. Did you ever grant members of the public who had no particular business either at the Supple Dock or at your premises permission or direction to use it?

A. No, I never gave anybody privilege to use it and never told anybody not to use it.

(Page 143, Transcript of Record.)

Judge Lurton in *Felton vs. Aubrey*, 74 Fed. 360, speaking of the burden upon the injured person said:

“And when one injured seeks to show that he was not a trespasser and relies upon implied license he should be required to make out the license clearly.”

This the defendant in error has failed to do, and the evidence introduced by the plaintiff in error does not help him upon this issue.

There was no evidence that the enterprises located on the roadway were public, or doing business of a public nature, or in which the public was in anywise interested. In fact, the evidence shows that these enterprises were all private, and that the roadway in question led only to them, and there is no evidence that the roadway was ever used except in connection with such enterprises.

Judge Lurton, in the quotation above set forth in *Felton v. Aubrey*, infers that, in order to establish a license in the public, the user must have been between “particular localities.” The evidence in that case was that the track was frequently crossed by people who were using the commons for cattle. In regard to this, Judge Lurton said:

“We are *not* prepared to say that on the testimony in this record the court would *not* have been justified in assuming the defendant in error to have been a trespasser and charging the jury upon that theory exclusively.”

As concluded by Judge Wolverton in *Cederson v. Ry. Co.*, Judge Lurton in *Felton v. Aubrey*, and the Minnesota court in *Akers v. Railway Co.*:

Tacit consent or passive acquiescence upon the part of the owner distinguishes a mere licensee from a trespasser, to whom the only duty is to refrain from wilful negligence, and there must be an invitation or substantial inducement to the public to use the premises for a particular purpose in order to raise an obligation of reasonable or ordinary care towards members of the public availing themselves of the invitation or inducement.

There is no claim of express invitation, and, to imply an invitation or inducement, the use by the public must have been definite, long, open, continuous, extensive and for purposes disconnected with the private way. Inasmuch as there was no claim by the defendant in error or evidence that the plaintiff in error's servant was wilfully negligent, or that he saw the defendant in error in time to avoid injuring him, it was incumbent upon the defendant in error to introduce evidence establishing these essential elements of user. This, he failed to do. Not only this, but his evidence affirmatively shows that the use by the public has been neither definite, long, continuous, extensive, or upon business disconnected with the private roadway. His evidence shows that the roadway led only to the private enterprises before named; that it was used in hauling cement for the Supple dock or other materials to and from the other private enterprises; that the only pedestrians who used the roadway were employes of the private enterprises before mentioned, or of the boats unloading at Supple's dock. As to other pedestrians, there is no evidence to show that this roadway was used except at odd intervals, and,

even as to such pedestrians, there is no evidence to show that they were not upon business with the owners or occupants, and hence there by invitation implied from such business. Witness Captain John Nelson testified that a person might want to go out and look at a boat or at the water, but there is no evidence that people did go out there for that purpose, or any other, except that they were employes or were on business with the occupants. The evidence is that the roadway did not lead anywhere so that the public could use it, except to satisfy their curiosity, and the evidence does not indicate that the public of this locality was curious.

To be sure, several witnesses for the defendant in error stated that the roadway was used by the public generally, but all these witnesses in further explaining the use of the roadway qualified their previous conclusions so that their testimony was to the effect that the public to which they referred were people who had business with the various private enterprises hereinbefore named.

The evidence introduced by the defendant in error goes no further than to prove that the use by the public, if at all, was simply desultory and occasional, with the acquiescence of the owners. This kind of evidence has been characterized by the courts as sufficient merely to save the intruder from being a trespasser, and as insufficient to raise any obligation of reasonable care toward him on the part of the owner or occupant.

The limited use of this roadway was fully recognized by the defendant in error and his counsel. Witness the allegations of their amendment to the complaint:

“was used by the public generally as a roadway for vehicles and pedestrians to pass and repass from

East Water Street to the wharves and docks known as Supple's dock, and the wharves and premises of the Willamette & Columbia River Towing Company."

It is not even claimed that it was or could be used for any other purpose except as a means of ingress and egress from these private enterprises. And, as before stated, the testimony fails to show that it was used except by those who had business with these concerns.

Fully appreciating that the public, as such, had no license upon this roadway, they then try to bring this defendant in error within that special class of persons who did have a license upon this private property—those persons who had business with the owners and occupants—by alleging and trying to prove an invitation to the defendant in error individually. It is alleged in the aforesaid amendment that he

"was, on said day at the time of receiving said injuries using the same by the *invitation* and permission of the City of Portland, and of *Joseph Supple and the Willamette & Columbia River Towing Company, the owners of said docks, wharves and premises.*"

Now let us see if his proof established a right to be there as an individual as distinguished from one of the general public. For him to do this, his proof must show that there was an invitation, express or implied, extended to him individually, by the owner or occupants of the private property.

The Defendant in Error does not claim or offered any evidence of express invitation, but relies upon the fact of his trunk being in the ware-room of the Willamette and Columbia River Towing Company, one of the owners of the private roadway, and that just prior to

the time of the accident he was on his way to get some of his clothing out of his truck, to imply an invitation from said company to himself to use this particular roadway. His proof shows (page 73 of the Transcript of Record), that the trunk was left at the ware-room of the company at the time he quit working for it some several years before. That it was left there with the company's permission, but without consideration moving from Defendant in Error to the company.

The authorities are agreed that no invitation will be implied unless one is upon the private property of the other for a purpose in which they both have a mutual interest or mutual benefit. The authorities have expressed themselves upon this point as follows:

In *Bennett vs. Louisville & N. R. R. Co.*, 102 U. S. 577; 26 L. Ed. 235, Mr. Justice Harlan said:

“It is some times difficult to determine whether the circumstances make a case of invitation in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license ‘The principle,’ says Mr. Campbell, in his treatise on negligence, ‘appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.’ ”

Plummer vs. Dill, 156 Mass. 426; 31 N. E. 128:

“To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged or which he carried on there. There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant.”

Mr. White on personal injuries, Sec. 872, says:

“The legal distinction which exists between the obligation that is due by the owner of the premises to the mere licensee who enters thereon without any enticement or inducement and the duty owing to one who enters upon a lawful business by the invitation, express or implied, of the proprietor, is well settled by the cases and the established principles of the law. The former enters at his own risk. The latter has a right to believe that, taking reasonable care of himself, all reasonable care has been used by the owner to protect him. In order that no injury may occur. There is no duty imposed by law upon an owner or occupant of the premises to keep them in suitable condition for those who come there for their own convenience merely, without any invitation, express or implied, and without having any business with the owner of such premises.

“The reason for the distinction is manifest, for the very basis of every action for an injury to the person is the violation of some duty owing by the party alleged to have caused the injury. Without a relation from which a duty would spring or be created by law, there could be no negligence or a breach of a duty that did not exist, and, consequently, no liability would exist, unless a relation be first established from which some correlative duty would be implied. That this is the logic of the law and a principle as well established as any property right recognized by the law is apparent from the reasoning of the opinions of the highest courts.”

Kennedy vs. Chase, 119 Cal. 637; 52 Pac. 33:

“The duty to one who comes thereon by the owner’s invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of his visit. Under such circumstances, the party is said to be on the premises by implied invitation of the owner.”

To the same effect see *Skottowe vs. Oregon Short Line Ry. Co. et al.*, 22 Ore. 430-50.

Defendant in Error has entirely failed to introduce any evidence tending to prove that his purpose upon this roadway was of any interest, advantage or benefit to the Willamette and Columbia River Towing Company, or any of the other occupants of said roadway. And the Defendant in Error has failed to establish a right to be upon this roadway by invitation to himself as an individual as distinguished from a member of the general public.

But even though it might appear upon casual examination, that the Defendant in Error did have the right by implied invitation from the owner to go along the roadway in question to the ware-room in which his trunk was located, yet he did not have a right and the invitation did not extend to the place upon the roadway at which the Defendant in Error was standing at the time of the accident, and the owner or occupant's duty to exercise reasonable care toward an invitee upon private property extends no further than the invitation. The Defendant in Error's testimony upon this point (page 74 of the Transcript of Record), discloses that he met witness Captain John Nelson, in the middle of the roadway, and that they together stepped over to the side of the roadway and leaned against the railing near a gap in the same, with their backs to the roadway, and there engaged in conversation not upon matters connected with the purposes of his visit to the property of the Willamette and Columbia River Towing Company, and that they stood at that point for a period of about five minutes prior to the time of the accident.

Flannigan vs. Alcatraz Paving Co., 56 N. Y. Supp. 18, is a case illustrative of this well established principle.

In this case the plaintiff was a teamster employed by one who contracted with the defendant, owner of the premises, to remove asphalt from the defendant's premises, who left his team standing on a private roadway and went to the site of a nearby gate and fence, to answer a call of nature. For some unknown reason, a gate fell upon plaintiff, and he was seriously injured. There was evidence that the gate was in bad shape, and that its condition was known to the defendant. There was also evidence that the gate had been repaired by the defendant. The court instructed that if the gate was in defective condition and defendant knew it or should have known it it was his duty to have it repaired, and his failure was negligence, and under those circumstances the jury should find for the plaintiff. The trial court also instructed: "There is no evidence to show that plaintiff was guilty of contributory negligence."

The appellate court held that the defendant owed the duty to the plaintiff to use care toward him while on the premises in discharge of his duty.

"This duty to plaintiff, however, only existed as to the premises to which the plaintiff was required to go in performance of the contract between the defendant and plaintiff's employer. * * * Defendant was not bound to anticipate that these workmen would leave their carts and go to a part of the yard to which they were not required to go in carrying out the contract between defendant and plaintiff's employer, or that this plaintiff would use this gate for the purpose for which he did. * * * It is certain that no work that plaintiff was required to do required him to use this part of the yard. There was no invitation of the defendant to the plaintiff, express

or implied, to use this gate or fence for the purpose for which he did use it. * * * The plaintiff was not there engaged in any work which he was employed to do, but there to use defendant's premises for a purpose for which it was not intended, and without defendant's permission. Here the plaintiff entered these premises upon lawful business, by invitation of the defendant. He had a right to believe that all reasonable care had been used by the owner to protect him upon the portion of the premises where his work required him to go, but when he left the portion of the premises upon which he was invited and went over to this gate for reasons of his own he went there at his own risk, and in that position he was not entitled to assume that the defendant would use all reasonable care to protect him."

As claimed by the defendant in error, the only purpose of his being upon the roadway was to go to the ware-room to get some clothing from his trunk. The only invitation that he claims from the owners or occupants was for that purpose, and under the authorities an invitation could in any event only be implied to that extent.

Upon cross-examination the defendant in error admitted (pages 70-71-72, Transcript of Record), that the entrance to the ware-room in which his trunk was located was on another and private roadway to the South of the roadway in question, near the office of the Willamette and Columbia River Towing Company, and right near East Water Street, and the usual and regular way to get to this ware-room from East Water Street was through the office or through a gate in the street onto this other private roadway, but that because there was no one at the office he went down the roadway in question intending to go back to the ware-room along

the other private roadway and to the South of the buildings located along the roadway in question.

If any invitation to go to this ware-room could be implied because of his trunk being there, it would only be to go there over the customary and usual route used for that purpose, that is: through the office or through the gate on the other roadway leading directly to it from Water Street, from whence the defendant in error came. But because he found no one in the office he presumed to extend this possible invitation and proceeded to try to get to the ware-room by this unusual route, and then instead of proceeding on his way with his wits about him over this unusual route selected by himself, he stepped aside into a dangerous place to visit with his friend, Captain John Nelson. If he had continued upon his way and had adhered to the purposes for which he claimed an invitation, he would not have been hurt.

As pointed out in Thompson on negligence, Volume 1, Sec. 990, even though the injured person may be upon the premises by invitation there is **"NO LIABILITY WHERE PREMISES ARE ENTERED OR LEFT BY UNUSUAL OR UNPROVIDED WAY."** This conclusion is well supported by the authorities cited herein under paragraph VI under Points and Authorities.

Whatever his purpose or right to be where he was at the time of the collision, the evidence introduced by him establishes beyond any doubt that he was guilty of contributory negligence. Witness Supple (page 139, Transcript of Record), and witness Captain John Nelson (pages 93 and 96, Transcript of Record), testified that this roadway was used very extensively for hauling by heavy automobile trucks.

THE DEFENDANT IN ERROR testified as follows:

Q. Now did you have your face or your back to the roadway?

A. Yes sir.

Q. What?

A. Yes sir.

Q. I mean the roadway on which you were standing?

A. Yes sir, our back out, we were standing there, and the roadway was right here.

Q. Your back?

A. Yes.

(Pages 51 and 52, Transcript of Record.)

CAPTAIN JOHN NELSON,

Testified as follows:

Q. Did you pay any attention to it?

A. No, because I was so used to seeing them come along there.

Q. You took your chances in other words?

A. I took no chance at all, if I would turn around every time I would hear an automobile truck, I would be breaking my neck.

(Page 93, Transcript of Record.)

In *Massey vs. Seller*, 45 Ore. 267-273, the plaintiff contended that he was upon the private property of the defendant by express invitation, and that the defendant owed him the duty of warning him against dangers. After noting the distinction between mere licensee and invited person, the Court said:

“But, having fully in mind this reasonable distinction, we are nevertheless of the opinion that the plaintiff was guilty of contributory negligence, he was in the room by express invitation, it is true; but the purpose for which he had been invited in there

had been subserved, and he was not about the business that called him in at the time he was injured. We place no stress on this fact, however, and it may be conceded that he was still in the shipping room by invitation. However, by his own statement, and it is all there is in the case upon the subject, he passed back into the shipping room from the display room with the express purpose of passing through it to the outside. If he had continued in his course, he would have passed out with perfect safety; but, desiring to get to a closet, he precipitately changed his purpose, and, noticing a dark corner, where he could see nothing, as he says, walked right into the elevator shaft without heeding his way, and the result was the injury of which he complains. He could not have been injured if he had paid the slightest attention to where he was going, or if he had not bolted headlong into the dark corner. He made no inquiry touching the object of his quest, and was heedless in proceeding in the dark without observing where he was going.

“From this plain state of the facts, about which there can be no cavil, we are firmly impressed that the plaintiff’s acts constituted contributory negligence as a matter of law, and he cannot for that reason maintain the action.”

And as it is observed in *Illinois Central Railway Company vs. Godfrey*, 71 Ill. 500-504:

“But where the plaintiff is himself in the wrong, or not in the exercise of a legal right or was at the time enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, he, the plaintiff, must use extraordinary care before he can complain of the negligence of another.”

There can be no doubt but that had either the defendant in error or his companion made any proper use of their senses they would have both seen and heard the

approaching truck in due season to have avoided the injury.

Without extending this argument further, we believe that it is apparent.

First. That the testimony fails to show a license in the public.

Second. That knowing this the defendant in error and his counsel pleaded and tried to show a special invitation, but without success.

Third. That then the defendant in error stepped aside from the purpose of the claimed invitation into a dangerous place.

Fourth. And there failed to exercise any care to prevent injury to himself.

And under the authorities cited, we submit that there was error as alleged.

Respectfully submitted,

PLATT & PLATT and
PALMER L. FALES,
Attorneys for Defendant in Error.

No. 2156

In the United States
Circuit Court of Appeals
Ninth Circuit

PACIFIC HARDWARE AND STEEL COMPANY
Plaintiff in Error

vs.

ALONZO L. MONICAL
Defendant in Error

Brief of Defendant in Error

Upon Writ of Error to the United States District Court
of the District of Oregon

There is but one point of law raised in the case by the four assignments of error. (Transcript, pages 368-371, Assignments of Error.)

The only other objection that was made or exception taken by the plaintiff in error during the trial of the case was in its motion for a non-suit and for a directed verdict, on the ground contended for by plaintiff in error that the defendant in error could not recover for the injuries inflicted upon him by

the plaintiff in error because he was guilty of contributory negligence in being on the roadway when he was injured. But this ground has been omitted from the assignments of error, and has, therefore, been abandoned. (Transcript, p. 208, Motion for Non-Suit; Transcript, pp. 291-292, Motion for Directed Verdict; Transcript, pp. 368-369, Assignments of Error.)

The point contended for by the plaintiff in error, in its four assignments of error, is that the roadway where the plaintiff in error inflicted the injuries upon the defendant in error was a private roadway owned by one Joseph Supple and the Willamette and Columbia River Towing Company; that, by reason thereof, the defendant in error was a trespasser thereon, as alleged in the answer (Transcript, pp. 26-27, paragraph XVIII), and, therefore, that he cannot recover damages for the injuries inflicted upon him because he did not allege that the plaintiff in error was guilty of wilfully or wantonly injuring him; and that by reason thereof the Honorable trial Court erred: (1) in not sustaining the motion of the plaintiff in error to non-suit the defendant in error at the close of his testimony; (2) in not sustaining its motion to direct a verdict for the plaintiff in error at the close of the testimony; (3) in refusing to give the instruction to the jury requested by plaintiff in error; and (4) in giving the instruction to the jury, on its own motion, "submitting to the jury, as

a question of fact, the question as to whether this structure was a private way or whether it was a semi-public way, and the failure of the Court to rule on that as a proposition of law.” (Transcript, pp. 208-210, Second Ground of Non-Suit Motion; pp. 292-293, Second Ground for Directed Verdict; pp. 312-313, Instruction Refused and Exception Taken; pp. 313-321, Instruction Given by the Court; pp. 368-371, Assignments of Error.)

The evidence, however, shows that the points raised and asserted by the plaintiff in error in the first three assignments of error and exceptions have no applicability or relevancy to the facts and circumstances of this case.

The evidence shows that the roadway in question was constructed over one of the public streets of the City of Portland, known as East Yamhill Street, and leads from East Water Street to the water front and harbor line of the Willamette River and the docks, wharves and premises of Joseph Supple and the Willamette and Columbia River Towing Company, the owners of the abutting premises; that in the year 1905 said parties petitioned the City Council of Portland for permission to improve said portion of said East Yamhill Street, and, upon being granted such permission, in 1905, constructed, at their own expense, a plank roadway about twenty feet in width reaching from East Water Street to the Willamette River and connecting with their docks, wharves and

other premises on the north and south sides of said roadway; and on the north side of said roadway constructed a wooden railing about four feet high as a guard rail.

Joseph Supple, and William E. Jones, secretary and treasurer of the Towing Company, testified that they constructed this roadway for their own convenience and for the use of the general public; that it had always, from the time it was completed, been used by the public, with their knowledge and permission, and that the public had a right to use the same. In fact, every witness who testified on the question testified that the roadway has always been used by the public generally; that both vehicles and pedestrians use it, and that it is the same to all intents and purposes as any other street or roadway of the city. (Transcript, pp. 53, 54, 55; 89, 90, 91, 92; 106; 116; 122, 123; 134, 135, 136; 139; 141, 142, 143, 144.

There is not a particle of testimony in the case to show that this roadway was used as a mere private way.

The contention, however, is made by the plaintiff in error, a stranger to the premises, in the teeth of the positive testimony of Supple and Jones and the other witnesses in the case, showing that this roadway has always been used by the public generally and is the same as any other public street of the city

leading to the river front, and that therefore the defendant in error had a right to use it and be there, that he was a "trespasser," and therefore cannot recover for the injuries inflicted upon him by the negligence of the plaintiff in error because he did not allege in his complaint that they were inflicted wilfully and wantonly.

The evidence shows that the defendant in error, at the time of the injury, had a trunk containing some of his clothing stored in the warehouse of the Willamette and Columbia River Towing Company on the premises abutting the south side of the roadway in question, and that he was walking along this roadway to the warehouse to procure some of the clothing from the trunk when he met a friend, Captain John Nelson, at a point about twenty-two feet easterly of the opening to the premises where the warehouse is situated, and stopped to talk with him, and that while he was engaged in talking and leaning with his arms on the guard rail on the north side of the roadway at this point, with his face to the north and back to the roadway, the servant of the plaintiff in error, in attempting, without notice or warning, to run and turn the auto-truck of the plaintiff in error at a speed of from twelve to fifteen miles an hour to the south and pass through the opening on the south side of the roadway about twenty-two feet to the west of where defendant in error and Captain Nelson were standing, and in so turning swept the

angle-irons which protruded about sixteen feet from the back of the truck over the guard rail on the north side of the roadway and struck the defendant in error in the side and rolled and knocked him through the railing onto a pile of logs on the ground about twenty feet below, from which he sustained the injuries set forth in the declaration.

The evidence also shows that the accident occurred at about 12 o'clock, noon, that it was a clear day, and that there was nothing to obstruct the view on the roadway in question at the point where the accident happened, and that they were in plain view of any person coming from the eastern portion of the roadway; that the servant of the plaintiff in error testified that when he was operating the truck towards the west on this roadway that he saw two men on this roadway to the west of him—although he denied that he saw them at the point where they were standing; and Andrew F. Johnson, a witness with whom he held a conversation two or three days afterwards, testified that the servant told him “that when he was operating his truck towards the west of that roadway hat he saw two men standing there.” (Transcript, pp. 286-288.)

CONTENTIONS OF DEFENDANT IN ERROR.

The defendant in error contends as follows:

I.

That the Court properly overruled the motion for

a non-suit on the ground asserted in the assignment of error number I, for the reason that said ground has no relevancy to the facts of this case, for the reasons hereinbefore set forth.

II.

That the Court properly overruled the motion for a directed verdict on the ground asserted in the assignment of error number II, for the reason that said ground has no relevancy to the facts of this case, for the reasons hereinbefore set forth.

III.

(a) The plaintiff in error did not save a proper or any specific exception, as required by law and the rules of the Court to the refusal of the Court to give the instruction requested by the plaintiff in error set forth in assignment of error number III.

The only exception taken being as follows: "Mr. Platt: Your Honor, we might have, I suppose, a formal exception to the refusal of the Court to give them as asked, and that will cover it?" Court: "Yes, you may have that." (Transcript, p. 312.) This exception clearly refers to the instructions requested *as a whole*, and not to a *specific* instruction pointed out to the Court.

(b) The instruction refused, however, was properly refused, for the reason that it was not relevant to the facts of this case, for the reasons hereinbefore set forth.

IV.

(a) The ground assigned in the assignment of error number IV is not the ground asserted in the exception taken by the plaintiff in error.

The exception taken, upon which this assignment is attempted to be predicated, is as follows: "I desire to except to the Court's submitting to the jury, as a question of fact, the question as to whether this structure was a private way or whether it was a semi-public way, and the failure of the Court to rule on that as a proposition of law." (Transcript, p. 313.)

(b) The Court did in fact instruct the jury that the roadway in question was a private way, but that it was for them to determine from the evidence whether it was *used* as a mere private way, as asserted by plaintiff in error, or as a public way. (Transcript, pp. 318, 313 et seq., Instructions Given.)

(c) The plaintiff in error cannot assert that the Court erred in submitting the question to the jury "whether it was a private way or a semi-public way," for the reason that at the close of the instructions to the jury the plaintiff in error made the following request: "Mr. Platt: If your Honor please, in submitting this question to the jury as to whether it was a private or a semi-public way, your Honor restricted it to Supple and the Towing Company. I presume you would *amplify* that to include all tenants and

persons having contract relations with Supple or the Towing Company, such as the East Side Boiler Works, for instance?" And in conformity with that request, the Court instructed the jury as follows: "Court: Oh yes, I think that would follow." (Transcript, p. 311.)

The plaintiff in error, therefore, waived any right he may have had to except to the instructions of the Court on that ground.

(d) The Court, however, properly submitted to the jury the question of determining from the evidence whether the said roadway was *used* as a mere private way or as a public way.

POINTS AND AUTHORITIES.

I and II.

Where a person is upon private premises, owned by the defendant, by invitation, express or implied, the defendant, and his servants, are required to exercise reasonable care to avoid injuring him; and, if the defendant has failed to exercise such reasonable care, and the plaintiff has been injured thereby, without any fault of his own which contributed to the injury, the defendant is liable in damages for such injury.

Hansen vs. Spokane Valley Land Co., 107 Pac. (Wash., 1910), 863.

Corby vs. Hill, 4 C. B. (N. S.), 556.

Phillips, et al., vs. Library Co., 27 Atl. (N. J.), 478.

Taylor vs. Delaware N Hudson Canal Co., 113 Pa. St., 162.

Haack vs. Brooklyn Labor Lyceum, 87 N. Y. Supp., 814.

The rule is that if it is shown that the public has for a long period of time, customarily and constantly, open and notoriously, used a private way, with the knowledge and acquiescence of the owner, a license or permission by the owner to all persons to use it will be presumed. Persons availing themselves of such an implied license would not be trespassers, and the owner and all other persons using such way would come under a duty in respect to such licensees to exercise reasonable care to avoid injuring them.

Felton vs. Aubrey, 74 Fed. Rep., 596.

Tennett vs. Railroad Co., 102 U. S., 577.

And cases cited Supra.

Persons using a private way, with the consent or permission of the owner, are entitled to the same degree of care and protection from injury, and are bound to the same degree of care in respect of other persons lawfully using it, as they would be on a public highway.

29 Cyc., 466.

Corby vs. Hill, 4 C. B. (N. S.), 556.

Felton vs. Aubrey, 74 Fed., 358.

A person going on premises to get property left there by him in storage in charge of the owner is not a trespasser.

29 Cyc., 445.

Pauckner vs. Wakum, 83 N. E. (Ill.), 202.

It is held that "to relieve one from liability on the ground that the injured person is a trespasser, the premises must belong to the person whose negligence is complained of."

29 Cyc., 443.

Commonwealth Electric Co. vs. Melville, 70 N. E. (Ill.), 1052.

The rule that where a person who is a mere licensee upon private premises is injured by some defective *condition of the premises*, such as an excavation, a pitfall, defective walk, etc., is not liable unless wanton or wilful negligence is shown, is not applicable to the case where the licensee is injured by the *affirmative* or *active* negligence of the owner.

Barry vs. Railroad Co., 92 N. Y., 293.

Pompino vs. N. Y., N. H. & H. R. Co., 34 Atl. (Conn.), 491.

James Corriagan vs. Union Sugar Ref., 98 Mass., 577.

Knight vs. Lanier, 74 N. Y. Supp., 999.

Corby vs. Hill, 4 C. B. (N. S.), 566 (Supra).

Felton vs. Aubrey, 74 Fed. Rep., 596 (Supra).

Byrne vs. Railroad Co., 104 N. Y., 362.

Where a person is rightfully upon a private roadway, either as a mere licensee, a licensee, or by invitation, express or implied, the owner is required to exercise reasonable care to avoid injuring him, and is liable for any injuries inflicted upon such person by any *affirmative* act of negligence of himself or servants, such as running into, or striking him, or committing any other part or *affirmative* or *active* negligence.

Barry vs. Railroad Co., 92 N. Y., 893 (Supra).
And other cases cited Supra.

III and IV.

The question of the manner in which or to what extent the roadway was *used*, namely, whether as a mere private way or as a public way, was a question of fact for the determination of the jury; and the Court, therefore, properly instructed them that that question was for them to determine.

Byrne vs. N. Y. etc. R. R. Co., 104 N. Y., 465.

Phillips vs. Library Co., 27 Atl. (N. J.), 478 (Supra).

Hansen vs. Spokane Valley Land Co., 107 Pac. (Wash.), 863 (Supra).

Taylor vs. Delaware & Hudson Canal Co., 113 Pa. St., 162.

Pompino vs. Railroad Co., 37 Atl. (Conn.), 491 (Supra).

Adams vs. Railroad Co., 84 Fed. Rep., 596.

ARGUMENT.

This case presents the extraordinary and anomalous question in this that the plaintiff in error, a stranger to the ownership of the premises in question where the injuries were inflicted by it upon the defendant in error, asserts that this roadway was a mere private roadway owned by Joseph Supple and the Towing Company, the owners of the adjoining premises; that, therefore, the defendant in error was a "trespasser," and had no right thereon, in the teeth of the testimony of both these parties positively showing that it is and always has been used as a public roadway; that it was constructed by them for that purpose; that the public generally and the defendant in error have always used it with their knowledge and permission, and, therefore, that he had a right to be there.

The evidence shows that the roadway is constructed over the extreme western end of East Yamhill Street—a public street of the City of Portland—and runs from East Water Street—a street running parallel with the Willamette River—to the water front of the river. In the year 1905 Supple and the Towing Company, the owners of the abutting premises, obtained a permit from the City Council of the City of Portland to improve this portion of East Yamhill Street from East Water to the Willamette River. And, in conformity with such permit, they constructed the plank roadway in question from

the river to East Water Street; and that it has been used ever since by the public generally who desired to gain access to the river front, Supple's docks and the wharves, warehouses and premises of the Towing Company.

Mr. Supple testified that the reason why they applied to the City Council for permission to improve and use this street was because it was obstructed by some old shacks, and that Mr. Wanzer, who was in the City Engineer's office, informed them that if they got permits to improve the street, he would clear the street of the shacks, so they could get to the dock.

As to the manner in which and the extent of the use of the roadway by the public, Mr. Supple's testimony is as follows:

Q. What has it been used for, Mr. Supple, since it was built?

A. A roadway to get out to the river and the docks out there.

Q. And whom has it been used by generally?

A. The public, everybody. Nobody had any privilege on it. As a public dock, that is all—a public roadway. I got a permit from the city to build it.

Transcript, pp. 134-135.)

Q. And you got a permit from the city to construct this roadway over the street, did you?

A. Yes, sir.

Q. From the harbor-line to Water Street?

A. Yes.

Q. And you constructed it for the use of the public and for your own generally, did you?

A. Yes, sir.

(Transcript, p. 135.)

Q. Then how has it been used since you constructed it, Mr. Supple?

A. It has been used for a public roadway, to get out to the docks.

Q. And in what way has it been used?

A. In what way?

Q. For pedestrians and vehicles, or what?

A. Yes, everybody used it. Walk out there, or drive, or go any way you want to go out.

Q. And by whose permission was that—yours?

A. Why, I got the permit from the city to improve the street. There were three blocks there, and there were a lot of old shacks and things obstructing these streets; and in 1905 Mr. Jones, owning the block south of me, and Mr. Leonard owning the block north of me—Mr. Wanzer was in the City Engineer's office, and he said if we got permits to fix the streets, to improve the streets, why, he would clear the streets of the shacks, so we could get out to the dock. So we got these permits, but after we got them, he could not clear the streets out, so it ran on till the next year. Next year I built the dock out there fronting my property, and then I built this

roadway at Yamhill Street to get to the dock, and since then it has been a *public highway*—nobody has ever been refused to us it.

Q. *And the public all use it?*

A. *Yes, sir.*

Q. *With your permission?*

A. *Yes, sir.*

(Transcript p. 136.)

And Captain Wm. E. Jones, secretary and treasurer of the Towing Company, testified:

Q. Your company is the company that, in conjunction with Mr. Joseph Supple, constructed the dock and roadway in question, was it?

A. *Yes, sir.*

Q. What was the purpose of the construction of that roadway, and for what has it been used since it was constructed, Mr. Jones?

A. It was to get to the dock and the river front.

Q. To the river front?

A. *Yes, sir.*

Q. From the harbor line to where?

A. To Water Street.

Q. And how has it been used by the public since then?

A. Well, the public has been using it. The public never was excluded from it. *Everybody has the privilege there that wants to go there.*

Q. *How long have they had that privilege?*

A. *Ever since it was built.*

Q. And how have they used it, for pedestrians and vehicles generally?

A. No, the vehicles hasn't any business there, that is, unless they want to go to the dock. There is no outlet to it, only if they go out there, they have got to come back the same way.

Q. Do you know the plaintiff in this case—Mr. Monical?

A. Yes, sir.

Q. How long did he work for your company, if at all?

A. Why, as near as I can remember, it would be about seven or eight years, probably.

Q. *Were you aware of the fact that he was in the habit of going on that roadway, and upon your premises, on the south side of it?*

A. *Yes, sir.*

Q. *For how long has he been doing that?*

A. *Well, ever since we have been there occupying that.*

Q. Did he go there with the permission of your company and yourself?

A. Well, I never gave him any special permission to go there; nor I never told him not to.

Q. *Did you consider that he had a right to be there?*

A. *Yes, sir.*

(Transcript, p. 142.)

Q. *How long did you say he had been in the habit of going there, Mr. Jones?*

A. *Ever since the roadway was built.*

(Transcript, p. 142.)

To same effect, see also testimony of Captain Nelson, Transcript, pp. 90, 91, 92; Mr. Dick Turpin, Transcript, p. 106; Mr. G. J. Smale, Transcript, pp. 115, 116, and Mr. W. C. Cohen, Transcript, pp. 122, 123.

These are the facts upon which this plaintiff in error asserts that this roadway was a mere private way, and that the defendant in error, by reason thereof, was a "trespasser" thereon at the time he was injured by the plaintiff in error, and that it is, therefore, not liable in damages for such injuries.

The ground asserted in the motion for the nonsuit and the motion for a directed verdict is that the plaintiff in error was not liable because the defendant in error was "*an implied licensee*" upon a private way. (Transcript, pp. 209, 293.)

The cases cited in the points and authorities show that the rule is universally settled that when a licensee, either express or implied, is injured on a private way, by any *affirmative* act of negligence of the owner, or other person, that such owner or person is held to the same degree of reasonable care to avoid injuring such person, and is liable for any in-

jury inflicted thereon, under the same rules that are applicable to injuries occurring on a public highway.

The plaintiff in error has not cited a single case in its brief where it is held that a person who injures 'an implied licensee' by an act of *affirmative* negligence on a private roadway is not liable for such injury unless it be shown that the act was committed wilfully or wantonly; but it has cited several cases which clearly lay down the doctrine that in such cases the party is liable when guilty of an *affirmative* act of negligence, and draw the distinction between cases of *passive* negligence of the owners of such premises and *active* or *affirmative* negligence.

Mr. Justice Lurton, in *Felton vs. Aubrey*, 74 Fed., Rep. 358-360 (cited by plaintiff in error), a case where the injury occurred while the plaintiff was crossing a railroad track at a place not a public highway, by being struck by a moving train, says:

"It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the *mere condition of the premises* and those who come to harm by reason of the *subsequent conduct of the licensor*, inconsistent with the safety of persons permitted to go upon his premises, and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of *Corby vs. Hill*, and is a distinction

which should not be overlooked. If there be any substantial difference between the legal consequence of prmitting another to use one's premises and inviting or inducing such, the distinction lies in the difference between *active* and the merely *passive* conduct of such proprietor. * * * ”

“This distinction between liability for the *passive* and *active* negligence of the owners of premises to licensees is recognized very clearly in the Court of Appeals of New York. *Barry vs. R. Co.*, 92 N. Y., 290; *Lyne vs. R. Co.*, 104 N. Y., 363. In *Barry vs. R. Co.*, cited above, the plaintiff had been run over by a train, of whose approach no warning was given, while crossing a railway at a place which the people of the vicinity had openly and continuously used as a crossing for some thirty years. The Court said (Justice Andrews delivering the opinion), that, under such facts ‘the acquiescence of the defendant for so long a time in the crossing of the tracks by pedestrians amounted to a license and permission by the defendant to all persons to cross the tracks at this point.’ ‘These circumstances,’ said the Court, ‘imposed a duty upon the defendant, in respect of persons using the crossing to exercise reasonable care in the movements of its trains. * * * So long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating trains at this point, and was bound to use such reasonable precaution in their management as

ordinary prudence dictated to protect wayfarers from injury.' The English cases we have cited above as well as the cases * * * were distinguished upon the ground that the presented cases where the injury complained of resulted from no proximate *affirmative* act of the licensor by which the condition of the premises had been changed. The reasoning of these New York cases seems unanswerable, and accords with the natural justice of such a situation."

Mr. Justice Lurton also cites with approval the opinion of Williams J., in the case of *Corby vs. Hill* (4 C. B., N. S., 556)—the leading English case on this question—where an injury occurred on account of an obstruction having been placed on a private road, where he says: "I see no reason why the plaintiff should not have a remedy against such a wrong doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it."

The Court, in *Pompino vs. N. Y., etc., R. R. Co.*, 34 Atl. (Conn.), 491, a case where the defendant was charged with killing a person while crossing a railroad track, at a place not a public highway, and in which the defendant made the contention that the deceased was a "mere licensee," after discussing the distinction between the case of a licensee and a party invited upon private premises, says: "This distinction between the case of a licensee and that of a party

invited, in respect to the duty of keeping the premises safe for their use, is recognized in the following cases, and many others. * * * But, while this is so, it is also true that the land owner must not *himself*, by what has been called '*his own active negligence*,' injure either the licensee, or the party invited, while they are upon his land. This is a duty due to both equally. Towards both, in this respect, he is bound to exercise the same amount of care. Both are upon his premises, not as wrong doers, but by his permission; and, in respect to the duty in question, we know of no good reason why the nature and extent of it should not be the same in cases of license as in cases of invitation. * * *

Co a railroad company which allows the public habitually to use a private crossing of its tracks cannot use *active* force against a person or vehicle crossing under a license, expressor implied. * * *

The ground of liability in this case is negligence, and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was simply there by defendant's implied permission. *.Barry vs. R. Co.*, 92 N. Y., 293. In this view of the matter, we think it makes no difference whether we held the case at bar to be one of license or invitation; for the duty with which the defendant is here charged with is not the duty *to keep the premises safe for use*, but the duty of using due care not to injure *by its own act* those rightfully on its premises, and that duty is the same whether those persons

are on the premises as licensees, or upon 'invitaion' in the technical sense of the word.'

Mr. Justice Gray, in *Corrigan vs. Sugar Refinery*, 98 Mass. 577, a case where a boy was struck on the head by a beer keg negligently dropped by a servant of the defendant while the boy was passing through a private alley way, says: "It is immaterial in this case to consider whether, upon the facts offered to be proved, the way over the defendant's land, where the plaintiff received the injury sued for, was a public way, or whether, if it was not a public way, the defendants had so held it out as such, or otherwise induced the plaintiff to pass over it as to make them responsible for any hole or defect therein, within the rule discussed in *Sweeney vs. Ald Colony Rd. Co.*, 10 Allen 368, and *Gouret vs. Egerton*, Law Rep., 2 C. P., 371, cited for the defendants. The material question is, whether the keg fell upon the plaintiff's head by reason of the negligence of the defendant's servants. If it did, then whether this was a public or private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there, and may maintain this action. Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still

liable for any negligent *act of themselves or their servants*, which increased the danger of passing, and in fact injured him.”

The Court, in *Adams vs. Railroad Co.*, 84 Fed., 596, a case where children were killed while walking over a railroad trestle, which had been covered with planking, and used by the public as a walk, and the contention was made by the defendant that the children were trespassers, on this question says: “On the matter of passing across a railroad, or along its track, at points where no public crossing has been established by law or contracted for by the parties, and where no express invitation had been extended to the public or to individuals for such use, that the notorious, frequent and continued use thereof for such purposes by individuals or the general public, known to the officers and servants of the company, and acquiesced in by them without objection, would imply such a license as would relieve parties so using it from the charge of being trespassers, and would charge the corporation with the duty of expecting such persons to be on the tracks, and to use reasonable care to avoid inflicting any injury on them.”

The Court, in *Taylor vs. Canal Co.*, 113 Pa., St. 162, on the question of whether a certain footpath across the defendant’s land, alongside its railway track, had been *used* by the public as a footpath, said: “Where it is shown, as was done in this case, that the footpath across the company’s land had been

habitually used by the public for many years without objection, *it is for the jury to say whether the company acquiesced in such use.*” * * *

“Without undertaking to review the testimony on which plaintiff relied, we think the evidence is quite sufficient to warrant the submission of the case to a jury on the question of permissive crossing at the point where she was injured, and whether, in the movement of its trains, the company exercised that degree of care which, under the circumstances, it was in duty bound to do.”

The Court, in *Holmes vs. Drew*, 151 Mass., 578, on the question of whether the plaintiff was *using* the sidewalk on the land of the defendant by implied invitation, after reviewing the evidence, says: “This would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared, and the plaintiff so using it, would have gone upon the defendant’s land by her implied invitation. * * * Whether she had invited the plaintiff to cross her land on a paved walk * * * were questions proper to be submitted to the jury.”

Mr. Justice Earl, in *Byrne vs. Railroad Co.*, 104 N. Y., a case where the question arose as to whether a private alley way owned by the defendant, was *used* by the public and to what extent, says: “There was, however, evidence tending to show that there was an alley at the place where the plaintiff was injured,

which was extensively and notoriously used by the public without any objection on the part of defendant, or any question as to the right of all persons so to use it; and the judge charged the jury *that it was a question for them to determine to what extent and in what manner the alley was used by the public.* * * * The law, as there laid down, was fully warranted in the case of *Barry vs. N. Y. C. etc. R. Co.*, 92 N. Y., 298."

The other cases cited under points and authorities are to the same effect.

These cases cited show that where the defendant is guilty of any act of *affirmative* negligence, whereby he has inflicted injury upon a person using a private way, either as a licensee, or by invitation or permission, express or implied, that the rule is the defendant is liable if the act was committed while failing to exercise reasonable care to avoid injuring him.

The case at bar falls within the rule of these cases, where the distinction is laid down between injury caused by some *passive* negligence of the owner of the premises, by reason of some defective condition of the premises, as applied to mere licensees, and injury caused by the *affirmative* act of the owner, whereby he inflicts injury upon a person on private premises, either as a licensee or by invitation or permission, express or implied, of the owner. In the former cases the owner is held not liable, but in the

latter the courts universally hold him to liability for any affirmative act of negligence causing injury in failing to exercise reasonable care.

But aside from these authorities, and the contentions of the plaintiff in error, the evidence in this case shows clearly, without any conflict, that the roadway in question was always used as a public way, and, as stated by the owners of the adjoining premises, they knew that the defendant in error had used it for several years; that he used it with their permission, and had a right to use it; and that, therefore, he cannot be considered in any sense other than a person having a right to be there; and that the plaintiff in error is as liable for the injuries it has inflicted upon him for life as though they had been inflicted upon him on the public highway.

The evidence also shows that, in addition to the defendant having the right to be on the roadway in question as one of the general public, that he was on his way when injured to procure some clothing from his trunk in storage at the warehouse of the Towing Company. This, of itself, even if the roadway was a mere private way, would entitle him to the use of it as a passageway to the warehouse to procure his clothing.

The plaintiff in error, however, contends that he should have taken the other roadway to the south of the roadway in question, and that he would not then have been injured.

We know of no law which requires a person to take any particular road to a given place where there may be two or more leading to it, under the assumption that one may be more dangerous than the others; or that in the event that he proceeds by one road that may be longer than the other, that he cannot recover for an injury caused by the affirmative act of negligence of a stranger thereon. We submit that if there were such a rule, it would be highly absurd.

The case of *Phillips vs. Library Co.*, 27 Atl., 478, holds that where there are two private paths leading to certain premises that a licensee is not held to be negligent by reason of taking one deemed less dangerous than the other.

A complete answer to this contention, however, is that the roadway on which the defendant in error was injured was not of *itself* dangerous; it was rendered dangerous only by the affirmative act of the servant of the plaintiff in error in turning his truck at a highly dangerous rate of speed without giving defendant in error any warning and violently striking him with the protruding angle-irons and knocking him through the railing and onto the logs twenty feet below.

The evidence shows, and it is conceded by plaintiff in error, that defendant in error has been permanently injured in all the matters alleged in the declaration.

The evidence also shows, and the jury have found, under proper instructions from the Court, against which no exceptions were taken, that the plaintiff in error was guilty of inflicting these injuries upon defendant in error.

We, therefore, respectfully submit that the record shows that the Court did not commit any error of law in the trial of this case, and that the judgment rendered upon the verdict of the jury should be affirmed.

HENRY ST. RAYNER,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY AND COUNTY OF SAN FRANCISCO, a
Municipal Corporation, THE BOARD OF
SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO, IN THE
STATE OF CALIFORNIA, and PAUL BAN-
CROFT, GUIDO E. CAGLIERI, ANDREW J.
GALLAGHER, GEORGE E. GALLAGHER, A.
H. GIANNINI, J. EMMET HAYDEN, FRED
L. HILMER, OSCAR HOCKS, THOMAS JEN-
NINGS, ADOLPH KOSHLAND, BYRON
MAUZY, WILLIAM H. McCARTHY, RALPH
McLERAN, CHARLES A. MURDOCK, DAN-
IEL C. MURPHY, EDWARD L. NOLAN,
HENRY PAYOT and ALEXANDER T.
VOGELSANG, as Members of the Board of
Supervisors of the City and County of San Fran-
cisco,

Appellants,

vs.

SPRING VALLEY WATER COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corpora-
tion,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, THE BOARD OF
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COUNTY OF SAN FRANCISCO, IN THE
STATE OF CALIFORNIA, and PAUL BAN-
CROFT, GUIDO E. CAGLIERI, ANDREW
J. GALLAGHER, GEORGE E. GALLA-
GHER, A. H. GIANNINI, J. EMMET HAY-
DEN, FRED L. HILMER, OSCAR HOCKS,
THOMAS JENNINGS, ADOLF KOSH-
LAND, BYRON MAUZY, WILLIAM H. Mc-
CARTHY, RALPH McLERAN, CHARLES
A. MURDOCK, DANIEL C. MURPHY, ED-
WARD L. NOLAN, HENRY PAYOT and
ALEXANDER T. VOGELSANG, as Mem-
bers of the Board of Supervisors of the City
and County of San Francisco,

Defendants.

Bill in Equity.

To the Honorable, The Judges of the District Court
of the United States, Northern District of Cali-
fornia, Second Division:

The Spring Valley Water Company, a corporation,

as hereinafter stated, files this its bill of complaint against the City and County of San Francisco, a municipal corporation, the Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, [1*] George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco.

And thereupon your orator, said complainant, complains and avers as follows:

I.

That your orator is, and was at all the times hereinafter mentioned since the 14th day of September, 1903, a corporation duly incorporated under and in pursuance of the laws of the State of California, and that the Spring Valley Water Works was at all the times hereinafter mentioned, until the expiration of its term of existence, a corporation duly incorporated under and in pursuance of the laws of the State of California, and especially under an act of the legislature of the State of California entitled: "An Act for the Incorporation of Water Companies, approved April 22d, 1858," and that your orator on the 14th day of September, 1903, became, and ever since has been, and is now, by purchase and grant from said Spring Valley Water Works, and by additions

*Page-number appearing at foot of page of original certified Record.

thereto made by itself, the owner and in possession of, and in the occupation and use of, all the properties hereinafter described and referred to or referred to in any way for use in the corporate business of your orator in supplying said City and County of San Francisco and its inhabitants with pure fresh water.

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II.

That the City and County of San Francisco, defendant herein, is, and at all times hereinafter mentioned was, a municipal corporation duly incorporated under the laws of the State of California.

III.

That the defendants, Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, are and were on June 20, 1912, and ever since have been, the duly elected or appointed, qualified and acting Supervisors of the said City and County of San Francisco, and members of and constituting the Board of Supervisors of said city and county, and have been such members ever since on or about the 1st day of February, 1912.

IV.

That prior to the cession of California to the United States by the Treaty of Queretaro, the place where the City of San Francisco now stands was an open moor, the residents thereof not exceeding two

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hundred in number. After the cession of the territory to the United States and the discovery of gold therein, a numerous immigration was attracted to California; a large portion of which came by sea, and very many settled at the place then called Yerba Buena, but which in a short time acquired the name of San Francisco, by which it has ever since been and still is called, save that the changes occurring therein are the [3] “City of San Francisco” and “the City and County of San Francisco.” The population of the place was given in 1850 at 34,000 persons. By the U. S. Census of 1860, it was ascertained at over 56,000, by that of 1870, at over 149,000, by that of 1880, at over 233,000, by that of 1890, at over 298,000, by that of 1900, at over 343,000, and by that of 1910, at 416,912. The present number of inhabitants is estimated by your orator to be over 420,000. The inhabitants of said place were incorporated by the legislature of the State, under the name of the “City of San Francisco,” by an Act passed April 15th, 1850; reincorporated with enlarged boundaries by the Legislature aforesaid by an Act passed April 15th, 1851; reincorporated and its name changed to the “City and County of San Francisco” by an Act passed April 19th, 1856 (commonly called the Consolidation Act), with still further enlarged boundaries and with enumerated powers, under which last mentioned Act and the amendments thereto, passed by subsequent legislatures of said State, the affairs of the city continued to be administered and its municipal government carried on down to the 8th day of January, 1900, when a charter for said city

and county, which had been previously adopted by the people and approved by the legislature, went into effect and still, with certain amendments thereto, remains in force. For the provisions of said several enactments and charters and amendments, in detail, so far as the same or any part thereof may be material to the present case, your orator prays leave to refer to the same as enrolled in the archives of the State and printed in the Statute Books of said State.

[4]

Your orator further shows that the portion of the city limits occupied and built on for occupancy, increased with the growth of its population. In 1850 it was almost entirely comprised between Vallejo Street on the north, California Street on the south, the shore of the Bay of San Francisco on the east, and Dupont Street on the west. In 1852 it was surveyed and a topographical map thereof prepared by the officers of the United States Coast Survey showing the lines of the streets so far as then marked on the ground, and the buildings then in existence, a copy of which map on which are also drawn the lines of the city limits as expressed in the Charter of 1850 and 1851 will be offered by your orator as evidence in this action, and is now on file in said court in an action in equity entitled, "Spring Valley Water Works vs. The City and County of San Francisco, a municipal corporation," and others, which said action is numbered 13,395 in the files of said court. In 1857 the said city was again surveyed and mapped as aforesaid by the officers of the United States Coast Survey and a copy of the map of the last men-

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tioned survey, prepared and published by the United States, showing the lines of the streets so far as then marked on the ground, and the buildings then in existence, to wit, when said last mentioned survey was made, will be offered by your orator as evidence in this action, and the same is now on file in said court in an action in equity numbered 13,395, and entitled, “Spring Valley Water Works vs. The City and County of San Francisco, a municipal corporation,” and others; said maps also show, by contour lines, the topography of the site and the elevations above tide level of the various localities in said city embraced within their [5] respective boundaries as delineated thereon.

Your orator further shows that, commensurately with its increase of population, the commerce and commercial importance of said City of San Francisco also increased, and, from the year 1850 on, it has been and remains the commercial center of the whole west coast of the United States, frequented by all the shipping that carries on the commerce between the State of California and other parts of the world; the tonnage of vessels arriving in San Francisco during said period taken at intervals of 10 years was, as your orator is informed and believes, as follows:

In 1850.....Tons	387,056;	In 1880.....Tons	827,794;
“ 1860..... “	429,484;	“ 1890..... “	1,080,477;
“ 1870..... “	456,749;	“ 1900..... “	1,487,816;
In 1910.....Tons 5,256,970.			

The imports and exports by sea during the same period were, so far as known, as follows (stated at intervals of 10 years, as before):

(1) IMPORTS:

In 1850.....	Unknown;	In 1880.....	\$37,240,514;
“ 1860.....	\$ 8,746,602;	“ 1890.....	45,594,125;
“ 1870.....	19,733,850;	“ 1900.....	39,424,435;
In 1910.....\$50,669,435.			

(2) EXPORTS, during the same years:

In 1850.....	Unknown;	In 1880.....	\$35,563,286;
“ 1860.....	\$8,532,439;	“ 1890.....	39,969,591;
“ 1870.....	17,848,160;	“ 1900.....	41,419,679;
In 1910.....\$65,047,460.			

[6]

That the average rate of increase in exports since 1900 shows a ratio of increase quite largely over the average of the previous years mentioned. And the total shipments by sea of merchandise and produce from San Francisco, between January 1st, 1850, and January 1st, 1891, amounted in value to \$920,182,391, and that such value has been largely increased since the last named date so that at the present time it amounts to many millions more.

That the value of the real estate within said City and County of San Francisco, as ascertained by the City and County Assessor, and mortgages on real estate therein as returned by the City and County Assessor thereof at intervals of 10 years, from 1859, has been as follows:

Year 1859-60.....	Real Estate.....	\$ 14,172,235;
1869-70.....	“ “	69,776,603;
1879-80.....	“ “	164,939,604;
1889-90.....	“ “	164,546,348;
1899-00.....	“ “	190,370,155;
Mortgages..	49,836,106;
1909-10.....	“ “	288,095,453;
Mortgages.....	40,338,365.

That there existed in its early history and outside and west of the limits of the city as defined by the acts of incorporation of 1850 and 1851 a stream of water flowing to the ocean, capable of supplying about 2,500,000 gallons of water per day, and a private company called "The San Francisco City Water Works" (or more commonly called the "Bensley Company" from the name of its projector) obtained control of this stream and conducted [7] its waters into the city by an aqueduct running along the water front of the Golden Gate, at an elevation of about 20 feet above tide level. This water was pumped into a reservoir 300 feet above tide level, whence it was distributed in pipes underground through the streets of the city on which there were buildings, for the supply of the city and its inhabitants with water, for the extinguishment of fires, and domestic uses, and afforded, from the time its works became available, a sufficient supply at that period, but later the quantity of water supplied and capable of being supplied by the said San Francisco City Water Works, although extremely useful and valuable, was manifestly insufficient for the wants of a city of the importance which San Francisco was evidently destined shortly to attain, and the said company having no other sources of water supply, one George H. Ensign, and others associated with him, who possessed certain water rights deemed available for the purpose, projected the use of them for the supply of the said city; and the legislature of the State of California, on the 23d day of April, 1858, passed an Act entitled, "An Act to authorize George

H. Ensign and his associates to lay down water-pipes in the public streets of San Francisco," whereby it was provided in substance that the said Ensign and his associates, owners of the Spring Valley Water Works, were authorized to introduce water into the City of San Francisco and lay pipes through the streets thereof for its distribution. They were required to lay 3,000 feet of such pipes within a year from the passage of said Act, and the rest as fast as practicable thereafter. [8] The said Act required water to be furnished to the City for the extinguishment of fires gratuitously, and regulated the mode of determining the prices of that furnished to consumers, which were thereby directed to be fixed at sums that would pay the said Ensign and associates, or said Spring Valley Water Works, not less than twenty per cent per annum on their actual capital invested in said works, and that after the lapse of twenty years the City of San Francisco should for 10 years have the right, on giving six months' notice of its intention so to do, to purchase the works at a valuation as therein provided. For the whole text and particulars of the provisions of said Act your orator prays leave to refer to the text thereof as shown in the Archives of the State and as printed in the Statutes of said State.

Under the encouragement of said Act the said Ensign and his associates proceeded to incorporate the Spring Valley Water Works (the grantor and predecessor of your orator) and undertook the supplying of the city and its inhabitants with water. The said company complied with all the terms of said

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Statute and acquired the necessary lands, water rights and reservoir sites in, and in close proximity to, the said city, and did add to and increase from that time down to the said grant made by it to your orator herein, and your orator has since said grant to it down to the present, as the city grew in territorial extent, wealth and commercial importance, and in necessary anticipation thereof, added to and increased, under the advice of most capable and competent engineers, their respective means and appliances for supplying [9] water to the said city and its inhabitants and distributing the same by means of pipes laid underground through the streets of the city, keeping in view in all such the continued growth of the city in extent and population, as well prospective as actual, its peculiar geographical position and climatic conditions and the necessity of providing against its wants, in advance of their occurrence, as well as the probable demand at any time for a very large supply of water to meet the contingency of contagious sickness, war or the occurrence of long periods of drought. The Spring Valley Water Works acquired all the property and water rights of the San Francisco City Water Works in 1864. The policy of the said Spring Valley Water Works always was, and the policy of your orator has been and is, to have a storage capacity equalling at least a three years' supply on account of the varying annual quantity of rain, which has been as low as 7.40 inches and as high as 50 inches (the average for the past 51 years or more having been about 25 inches), but the average for the last five years previ-

ous to the winter season of 1902-03 was only 16.64 inches; that of 1902-03 was only 18.18 inches; that of 1903-04 was only 20.36 inches; that of 1904-05 was only 23.76 inches; and for the year 1906-07 to the date of May 9, 1907, was 30.96 inches; and for the year 1907-08 to the date of June 8, 1908, was 18.63 inches; for the year 1908-09 it was 25.57 inches; for the year 1909-10 it was 19.52 inches; for the year 1910-11 it was 25.49 inches; and for the year 1911-12 it was only 13.25 inches; and that your orator's record for the year 1905-06 was destroyed in the conflagration of April 18, 1906, and cannot be stated. [10] The Spring Valley Water Works, before September 14th, 1903, furnished, and your orator since has furnished, water to the following amounts:

In 1865	865 million gallons;		
" 1870	2,204	"	"
" 1875	4,266	"	"
" 1880	4,627	"	"
" 1885	6,223	"	"
" 1890	7,457	"	"
" 1895	7,264	"	"
" 1900	9,295	"	"
" 1901	9,736	"	"
" 1902	10,101	"	"
" 1903	11,532	"	"
" 1904	12,379	"	"
" 1905	12,746	"	"
" 1906	10,657	"	"

(this quantity being somewhat reduced from the previous year by reason of portions of the city not taking water in parts of the area which were covered by

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the conflagration of April, 1906).

In 1907	11,181	million	gallons;
“ 1908	11,574	“	“
“ 1909	12,465	“	“
“ 1910	12,995	“	“
“ 1911	13,667	“	“

The other principal properties acquired for the purposes aforesaid by the Spring Valley Water Works and by your orator, and now all owned by your orator down to the present time, are briefly as follows, viz.: [11]

The ownership of over 31,870 acres of watershed lands in San Mateo County, on which four fine reservoir sites are situated, viz., the Pilarcitos, the San Andreas, the Crystal Springs, and the Portola or San Francisquito. The acquisition of these lands enables your orator to protect the waters from pollution. The above named reservoirs and the nine distributing reservoirs in the City of San Francisco were constructed from time to time as the growing demands upon the said Spring Valley Water Works and, subsequently, upon your orator since said grant to it, required. The Pilarcitos was built first with a capacity of about one thousand million gallons, at an elevation of 700 feet above tide. Its waters, before the calamity of April, 1906, supplied by gravitation almost the entire Western Addition and the higher portions of the Mission, in the City and County of San Francisco, being stored en route in the Lake Honda distributing reservoir, situated in the hills south of the Park, 365 feet above city base, and having a capacity of 33,000,000 gallons. The water was,

before said date, conveyed from Pilarcitos to Lake Honda in a conduit of three long brick-lined tunnels aggregating one and a half miles, a redwood flume one and a half miles, and an iron pipe, thirty and twenty-four inches in diameter, 14 miles in length.

The San Andreas was built next. It has a capacity of about six thousand million gallons, and is situated 450 feet above tide, and supplies by gravitation the foothill region located west of Valencia, north of Market, as far east as Gough Street, and portions of the Potrero hills. Its water is stored en route in College Hill distributing reservoir, [12] near Holly Park, in the south Mission, San Francisco, 255 feet above city base, and has a storage capacity of fourteen million gallons.

The Crystal Springs was constructed next. It is situated three and one-half miles southwest of San Mateo, at an elevation of 287.85 feet above tide, and has a storage capacity of twenty-two thousand five hundred and twelve million gallons. The upper dam was first built, but later on the concrete dam was constructed. It is to be raised to the 300-foot level as the next stage, when it will have a storage capacity of twenty-nine thousand million gallons, and later on to a higher level, when it will have a storage capacity of between forty thousand and fifty thousand million gallons. The water from Crystal Springs supplies by gravitation the lower parts of the city east of Valencia, north and south of Market, east of Kearny and along the city front to North Beach and the Presidio. Its distributing reservoir in the city is the University Mound located in the southeastern

part of the city, 165 feet above city base. The last named reservoir has a capacity of 35,000,000 gallons and is connected with Crystal Springs reservoir by a 44-inch iron conduit in the neighborhood of 17 miles in length.

The Portola reservoir was built next, on the San Francisquito Creek. Its dam at present is completed to a height of 60 feet; it can be raised 40 feet additionally, that is, to an elevation of 370 feet above tide; it will then have a capacity of three thousand million gallons, and will be connected with the Crystal Springs reservoir by a conduit leading thereto. The said reservoir is not now in use by your orator as a source of supply. [13]

The Spring Valley Water Works and your orator have acquired very valuable properties on Alameda Creek and its tributaries, and at Livermore Valley, near Pleasanton, and in Sunol Valley and Calaveras and San Antonio Valleys (part of which properties are situated in Alameda County and part in Santa Clara County), consisting of many thousand acres of land, water rights, reservoir sites, watersheds and rights of way, and a large natural filtering and storage bed of almost unlimited capacity, and a concrete gallery existing under and into the same,—all of which give it practically the control of the water output from a watershed of more than 621 square miles; all of which properties now belong to your orator. Said Alameda Creek system contains several fine reservoir sites, the most important being the one in Calaveras Valley, which has a capacity of fifty-eight thousand million gallons, or more, and an elevation

of 800 feet above tide; it alone can supply by gravitation fifty million gallons or more, daily, to San Francisco. This system is now furnishing San Francisco with more than sixteen million gallons per day, and will, within thirty days from the date hereof be furnishing it with more than twenty million gallons daily. When the system is fully developed it will be able to furnish an average of more than one hundred and twenty million gallons daily.

That from the present Alameda Creek system the water flows through a 36-inch pipe, connected with tunnels and flumes and conduits, to the westerly shore of the Bay of San Francisco, near Dumbarton Point; from here an intermediate slough and the Bay of San Francisco are crossed by two 16-inch submarine pipes, and two additional submarine [14] pipes 22 inches in diameter, each of the four being about one and one-quarter miles in length. From the westerly ends of the submarine pipes, near Ravenswood, on the west shore of the bay, the water flows through a 36-inch iron pipe to the Belmont pumping station, in San Mateo County, where it is lifted to an elevation of over 240 feet above tide, and therefrom flows in a 36-inch pipe to a place near Burlingame where it connects with a 54-inch pipe through which it flows to Milbrae, where it connects with the before-mentioned Crystal Springs iron pipe line, 44 inches in diameter. The total length of the Alameda pipe line, exclusive of the submarine pipes, is about 28 miles.

The Spring Valley Water Works, first, and thereafter your orator, also acquired the Laguna de la Merced Rancho and adjoining lands, aggregating

over 2,850 acres, on which Lake Merced is situated, having a storage capacity of twenty-five hundred million gallons. That Lake Merced is situate in the City and County of San Francisco, and said Rancho is situate partly in the City and County of San Francisco and partly in the County of San Mateo.

Said lake is connected with the city distributing system by a fine pumping station having a daily capacity of seven million four hundred thousand gallons.

The Spring Valley Water Works first owned, and thereafter and now your orator also owns, certain water rights and lands on Lobos Creek, and a pumping station partially equipped, with a capacity of two million gallons daily. That the waters of Lake Merced form a valuable adjunct to the works of your orator on account of their proximity to the city, and that double their average capacity [15] can be thrown into the city distributing system temporarily in case of any serious break in other parts of the works or in case of any calamity.

Your orator has nine distributing reservoirs in the said city and county, having an aggregate capacity of over 90,000,000 gallons, viz.:

The Clarendon Heights.....	600	feet	above	city	base
“ Laguna Honda.....	365	“	“	“	“
“ Clay Street Hill.....	375	“	“	“	“
“ Lombard Street Hill.....	306	“	“	“	“
“ Potrero Heights.....	300	“	“	“	“
“ College Hill.....	255	“	“	“	“
“ University Mound.....	165	“	“	“	“
“ Francisco Street.....	135	“	“	“	“
“ Presidio Heights.....	400	“	“	“	“

Your orator has nine pumping stations; they have an aggregate capacity of 68,000,000 gallons daily, or over, and are so located that they supply high portions of the city with water under a first-class pressure up to 600 feet above city base, and are so arranged that the various districts can be supplemented, when necessary, one from the other. The Spring Valley Water Works and your orator have built tunnels of an aggregate length of over 10.63 miles, flumes of an aggregate length of over 17 miles; and the following pipe-lines, viz.: [16]

22.97	miles	of	pipe	44	inches	in	diameter;
281½	"	"	"	36	"	"	"
25.29	"	"	"	30	"	"	"
.88	"	"	"	18	"	"	"
.42	"	"	"	24	"	"	"
3.71	"	"	"	16	"	"	"
4.66	"	"	"	22	"	"	"
3.17	"	"	"	54	"	"	"
.56	"	"	"	37	"	"	"
1.18	"	"	"	23	"	"	"

besides other pipe and pipe-lines used in the distributing system of your orator, and now all owned by your orator; and in addition thereto over 455 miles of distributing pipe laid in the streets of the said city, by which water is supplied under great pressure to consumers for domestic and other uses, and to the government authorities of said city for the extinguishment of fires and for the cleansing of sewers, for which last mentioned purposes and for other municipal purposes your orator and its grantors have, at the request of said city, erected and connected with said distributing pipes in excess of 4387 hydrants in

the streets of said city, which, on being opened, deliver water for the purposes aforesaid under great pressure (greater than that of any others in any of the large cities in the United States), consequent on the elevation of the said distributing reservoirs above the streets, whereon said hydrants are situated. That the total length of pipes used by your orator in supplying the inhabitants of the City and County of San Francisco with water is over 545 miles. [17]

All the said reservoir sites, watersheds, water rights and sources of supply have been purchased by your orator, and its grantors, at prices much less than their present value, respectively, and the said other works have been erected and constructed as skillfully and economically as possible, under the direction of engineers of the highest skill and learning, and without any useless or unnecessary outlay, and have been so purchased, prepared and constructed for the sole purpose of supplying the said City and County of San Francisco and its inhabitants with water as aforesaid. Taken altogether, they constitute a system of water works for a great city absolutely unique in the world, and are not only ample for the needs of the city, with its past and present population, but are capable of extension by the construction of additional dams and aqueducts such as will store and supply sufficient water for the wants of more than two million inhabitants, and this for a small expenditure compared with the fundamental expenditures already made. The value of these properties already acquired for such extensions is not included in the value of the plant in use by your orator as hereinafter set forth. The

properties now in use for the purpose of supplying the City and County of San Francisco and its inhabitants with water are worth in excess of fifty million dollars, while those which will be so utilized in the immediate future are worth many millions more. If the latter had not, by the foresight of your orator and its grantor, been secured in advance of any visible actual necessity therefor, they would have been practically unobtainable not only on account of their largely increased value, but also because they would have been devoted heretofore to other uses such as would have contaminated and unfitted them for domestic water service. [18]

That your orator has caused the actual cost of said water works to the stockholders of its grantor, and to its stockholders, down to the 15th day of June, 1912, to be carefully computed by competent accountants, on the basis of setting down the sums derived by its grantor from sales of its stock and contributions by stockholders of your orator's grantor, at the date of their respective payments, and adding thereto interest thereon at contemporary current rates, down to the next succeeding first of January, and deducting therefrom dividends paid during the year, with interest thereon at the same rate, from the time the same became payable, down to the same date, and carrying forward the difference as a new balance; that, by adding to this sum, so computed, the amount of bonds outstanding, the actual cost of said works to the stockholders of the said grantor of your orator, and to your orator, at the date aforesaid, has been ascertained to be, and your orator avers that the

same has been and is, the sum of \$70,574,244.50 at the present time, as follows,—whereof there were derived:

From sales of stock and invested earnings belonging to stockholders of your orator's grantor and interest as aforesaid\$49,587,244.50,
And from sales of bonds of your orator and of its grantor..... 20,987,000.00.

Computed at the rates of interest contemplated by the aforesaid Act of April 23d, 1858, such cost would amount to a very much larger sum.

That the said grantor of your orator, for several years after its incorporation, divided none of its earnings among its stockholders, but reinvested the same in the increase [19] and extension of its works, to wit, now included in the works since said September 14th, 1903, and now owned by your orator; and, after it began to make dividends to its stockholders, never made such dividends equal to the contemporary, ordinary, current rates of interest or mortgage investments in San Francisco, nor even to the rate of twenty per cent per annum as contemplated in said Act of April, 1858, and that your orator has never paid dividends on its earnings since September 14, 1903, equal to the contemporary, ordinary or current rates of interest on mortgage investments, in San Francisco, and has not been able to pay, and has not paid, any dividends to its stockholders since January 20, 1906, when a quarterly dividend was paid at a rate for the previous quarter calculated on the basis of five per cent per annum, except as herein alleged:

The said dividends paid by the grantor of your orator have been as follows, and no more, viz.:

1858.....0%	1873.....6%	1888.....6%
1859.....0%	1874.....8%	1889.....3½%
1860.....0%	1875.....9%	1890.....7%
1861.....0%	1876.....9%	1891.....6%
1862.....0%	1877.....9%	1892.....6%
1863 3/5 of 1%	1878.....8½%	1893.....6%
1864.....0%	1879.....8%	1894.....6%
1865.....3½%	1880.....8%	1895.....6%
1866.....5%	1881.....8%	1896.....5½%
1867.....6%	1882.....8%	1897.....6%
1868.....6%	1883..2-2/3%	1898.....5½%
1869.....6%	1884.....4½%	1899.....5½%

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1870.....6%	1885.....6%	1900.....5-4/100%
1871.....6%	1886.....6%	1901.....3-78/100%
1872.....6%	1887.....6%	1902.....4-2/10%

That the enforcement of the ordinances which the then board of supervisors of the said City and County of San Francisco claimed to have been adopted in February or March or April or May or June of the years 1903, 1904 and 1905 was enjoined pendente lite by the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, and that such injunctions were, by the said court, on November —, 1911, made permanent and final. That the ordinances which the then Board of Supervisors of the said City and County claimed to have been adopted in February or March or April or May or June of the years 1907, 1908, 1909, 1910 and 1911 are in litigation in this court as to their validity, and the enforcement thereof is enjoined pendente lite; and that the aggregate of dividends paid to stockholders by your orator's grantor, and

by your orator, estimated on the same par value of the issued stock of your orator's grantor, to wit, fourteen million dollars, from moneys collected in 1903, at rates similar to those provided in the ordinance of 1902, was 3.78 per cent, and no more; and in 1904, at rates similar to those provided in said ordinance of 1902, 3.78 per cent, and no more; and under rates similar to those provided in the said ordinance of 1902 was, in 1905, 3.78 per cent, and no more; and in 1906, at rates similar to those provided in said ordinance of 1902, was 1.26 per cent, and no more; and in 1907, at rates similar to those provided in [21] said ordinance of 1902, was 0 per cent, and no more; and in 1908, two per cent and no more; and in 1909, 4 per cent and no more; and in 1910, 4 per cent, and no more; and in 1911, 4 per cent, and no more; and in 1912, 2 per cent, and no more, the said 2 per cent being made up of two quarterly dividends upon a basis of 4 per cent for the entire year.

That, under the ordinance, pretended to have been adopted by the then Board of Supervisors of said city and county on March 19, 1906, known as Bill No. 1996, your orator verily believes the dividends which it would have been able to pay to its stockholders for the fiscal year beginning July 1, 1906, and ending June 30, 1907, on a capital the same as the capital of the grantor of your orator, to wit \$14,000,000, would not have exceeded, even if it would have been as much as, 3 per cent had not the calamity of earthquake and fire occurred in said city and county in April, 1906; that is to say, three per cent on a capital being only one-half of the par value of the capital

stock of your orator, which capital stock is \$28,000,-000 (herein at this point no reference being had to the fair value of the property of your orator actually in use by your orator in such supply), and that as a fact during the year 1906 your orator was able to pay and did pay only one dividend, namely on January 20, 1906, which had accrued from its earnings in the year 1905; so that as a fact from the earnings of the year 1906 no dividend was paid that year by your orator to its stockholders, and that not only was no dividend paid to the stockholders during the year 1906, or could be paid from [22] its earnings in said year to its stockholders, but your orator was obliged to and did levy an assessment of \$3.00 per share on 280,000 shares, namely, the sum of \$840,000 to aid it in part in paying its expenses for that year; and that the collections made by your orator during the year 1906 were not sufficient to pay the fixed charges of your orator, said fixed charges being classified as operating expenses, taxes and coupon interest on its bond issues; that is to say, interest as provided in the bonds upon its bonded indebtedness. And your orator alleges that all the money represented by said bonded indebtedness was expended fairly, reasonably and properly in the purchase of properties for the use of your orator in such supply and for the construction of works for the use of your orator in such supply, less the reasonable and usual cost and commissions on bond sales.

The ordinary rates of interest for money lent on first-class mortgages on city property, as shown by the records in the office of the County Recorder, of

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the City and County of San Francisco, were and are as stated in the table next below for the respective years mentioned, except that in the years 1901 and 1902, 1903, 1904, 1905, and 1906, a very few most desirable and exceptionally favorable loans were made at a rate slightly below six per cent, and except that since the said calamity of April, 1906, the rate of interest has exceeded six per cent, and that at the present time the rate is not, and since the 1st day of January of this year, 1911, the rate of interest has not been, less than six per cent even in favorable instances, and in some cases has run up as high as eight or nine per cent. [23] That the rates of interest that prevailed in San Francisco from 1858 to 1912, both inclusive, were substantially as follows:

1858....24%	per annum;	1884....7%	per annum;
1859....24%	“ “	1885....7%	“ “
1860....21%	“ “	1886....7%	“ “
1861....18%	“ “	1887....7%	“ “
1862....18%	“ “	1888....8%	“ “
1863....18%	“ “	1889....7%	“ “
1864....15%	“ “	1890....7%	“ “
1865....15%	“ “	1891....7%	“ “
1866....12%	“ “	1892....7%	“ “
1867....12%	“ “	1893....7%	“ “
1868....12%	“ “	1894....7%	“ “
1869....12%	“ “	1895....7%	“ “
1870....10%	“ “	1896....7%	“ “
1871....12%	“ “	1897....7%	“ “
1872....10%	“ “	1898....7%	“ “
1873.... 9%	“ “	1899....6%	“ “
1874.... 9%	“ “	1900....6%	“ “
1875.... 9%	“ “	1901....6%	“ “
1876.... 9%	“ “	1902....6%	“ “

1877....	9%	per annum;	1903....	6%	per annum;
1878....	9%	“ “	1904....	6%	“ “
1879....	9%	“ “	1905....	6%	“ “
1880....	8%	“ “	1906....	6%	“ “
1881....	8%	“ “	1907....	7%	“ “
1882....	7%	“ “	1908....	7%	“ “
1883....	7%	“ “	1909....	6½%	“ “
			1910....	6½%	“ “
			1911....	6½%	“ “
			1912....	6½%	“ “

[24]

And your orator alleges that the City and County of San Francisco claims to have acquired by purchase a property known as the County Line Water Plant and Property, formerly owned by the County Line Water Company which was at one time used to supply an exceedingly small district in the City and County of San Francisco; that the water produced by said plant is pumped from wells; that there cannot be furnished or supplied therefrom one million gallons of water per day, and the water which is derived from said wells is of very inferior quality. That except for the alleged acquisition of said County Line Water Plant and Property and the construction of salt water systems and a system of pipes for fire protection, the City and County of San Francisco has not, nor have any of the public authorities thereof, ever acquired any property which is now used or ever has been used in supplying the City and County of San Francisco, or any of its inhabitants, with water, or for protection against fire or for any other purpose, but on the contrary, the water supply of said city has been left entirely to private enter-

prise, and ever since the passage of said Act of April 23d, 1858, and the purchase by your orator's grantor of the works of the said San Francisco City Water Works, such supply has been (with some very trivial exceptions of water supplied by wells, within the city limits, and a small amount furnished by the Visitation Water Company and the County Line Water Company for a limited period) effected by the works formerly owned by the Spring Valley Water Works and now owned by your orator, which works for more than forty consecutive years have supplied the city and the city and county and their respective inhabitants and have furnished them an abundant quantity of pure fresh water and [25] a better quality of water than obtains in any other large city in the United States, for the use of the inhabitants and of the municipality and the shipping frequenting this port (saving a short space of time when the earthquake of April, 1906, temporarily and partially interfered with the operation of your orator's plant for a few weeks and less than one month). So abundant and well-distributed is the supply of water secured by the said works of your orator for the purposes that the grantor of your orator did not, and your orator itself has not had even to request any economy in the ordinary and regular use of water in said city, and then only in case of what appeared to be willful waste. Your orator will enter upon the year commencing July 1, 1912, with a supply of over twenty-four thousand million gallons on hand in its reservoirs, as it had on hand on the first day of June of this year in its reservoirs over twenty-four thousand

million gallons. It also has an inflow or supply, at the present time, of sixteen million gallons per day additional thereto from its Alameda Creek system, which said supply will, within the next thirty days from the date hereof, be increased to twenty million gallons per day by means of the construction of a new pumping plant now being installed by your orator at Ravenswood.

That under the laws in force prior to the adoption of the said Constitution, which is generally known as the New Constitution, the grantor of your orator was required to supply the said city and county with water for the extinguishment of fire gratuitously, and the rates to be charged for the supply to consumers and for other purposes were to be determined by a board of five Commissioners, two to be selected by the city, two by the company, [26] these four to select the fifth person, and in case they could not agree the Sheriff was to appoint the fifth Commissioner. After said Constitution was adopted and after it went into effect these provisions were changed, and the Board of Supervisors of the city and county was by the provisions of said Constitution authorized and directed to fix water rates, and the city was required to pay for water supplied to it for extinguishing fires; and thereafter conferences were had between the officers of the grantor of your orator and the proper committee of the Board of Supervisors as to the proper mode of charging the city and county for water supplied to it through hydrants for the extinguishment of fires and the cleansing of sewers, wherein, after much discussion

and as a compromise of divergent opinions, it was agreed that, as it was impossible to determine the quantity of water used or even likely to be used by the city for such purposes, the proper method of charging and paying therefor was to establish a sum to be paid monthly for each hydrant so that the total amount paid might bear some proportion to the service rendered.

For the fiscal year 1882, 1883 the then Board of Supervisors by ordinance established two dollars and a half per month for each hydrant, as the sum to be paid by the said city and county for the said service, and that the rate was similarly continued until the year 1895, when the Supervisors increased the rate to the sum of five dollars per month for each hydrant, as a just and proper sum to be [27] paid therefor by the city, and then at once and ever since correspondingly decreased rates for domestic uses of water; and thereupon, for that and all succeeding years thereafter, and down to the adoption of the Charter in 1900, that sum was adopted in each consecutive year as the rate to be paid by the said city and county for the aforesaid service.

That the rate so established and in force for the years preceding the adoption of said Charter of January, 1900, was such as to enable the grantor of your orator to pay its current expenses, interest and taxes, and make to its stockholders the dividends above shown on its issued capital stock, but such rates did not make any allowance or provision for depreciation nor for obsolescence (hereinafter defined), nor for replacement of any of the plant destroyed by ex-

traordinary casualty. That in fixing such rates said Supervisors adopted the policy of throwing almost the whole cost and expense of water supply for the city and its inhabitants on the private consumers of water, and on the city and county, for water supplied to it through hydrants, a very small proportion thereof; in pursuance of which policy the rate for water supplied to hydrants was, as hereinabove mentioned, fixed by said Board of Supervisors at \$5.00 per month for each hydrant, a sum far less than the value and benefit of the service rendered. And the said Board of Supervisors first elected under the said Charter of January, 1900, did, after hearing testimony and after full consideration of the subject, unanimously adopt the policy and acts of the preceding Board, and determined that the said sum of five dollars per month for each hydrant was a just [28] and proper sum to be allowed for water so supplied, and in the month of February, 1900, passed an ordinance establishing water rates for the year commencing July 1st, 1900, wherein the rate to be paid by the city and county for water supplied to hydrants was established at the sum of five dollars per month for each hydrant, under which ordinance the grantor of your orator was able to pay its operating expenses, interest and taxes, and to divide among its stockholders 4.62 per cent on its capital stock, and no more, but was not able to make any provision for depreciation or obsolescence nor to provide a fund to replace capital expenditures destroyed by extraordinary casualties.

That in the month of February, 1901, however, the

then Board of Supervisors, consisting of the same individuals who had acted as such in the year 1900, except Supervisors Braunhart, Wilson and Stafford, in pursuance of the suggestion, and being advised by their Water Committee that such a measure would be popular, and hoping thereby to gain popularity and a re-election to office, and with the purpose of depreciating the market value of the properties of the grantor of your orator so that the city and county, if it should so elect, could acquire the same at a greatly reduced price, proceeded without any other or further evidence than they had before them in a like proceeding in the preceding year, and without the knowledge, or even the suggestion of any additional fact in connection with the subject, in and by their said ordinance of February, 1901, to and did reduce the charge or compensation to be paid by the said City and County of San Francisco, for water supplied to it for the extinguishment of fires, cleansing of sewers, etc., [29] through hydrants, from the said rate of \$5.00 per month for each hydrant, which would amount to \$225,300 and which they had themselves, but a year previously, determined to be a just rate therefor, to a lump sum of \$80,000 per annum for water supplied through all the hydrants in the city and county. That the number of such hydrants attached to and connected with and supplied with water by the said distributing pipes of the grantor of your orator then was 3,755, besides which there were others (the number of which is unknown to your orator) attached to and supplied by the distributing pipes of the Visitacion Water Company, a corporation.

That in February, 1902, the said Board of Supervisors fixed the said hydrant rate at the sum of \$2.00 per month for each hydrant, and that the number of hydrants connected with the distributing system now owned by your orator, and now in use, is 4,387.

That in March, 1903, the then Board of Supervisors of said city and county claimed to fix hydrant rates for the next ensuing fiscal year at \$2.00 per hydrant; that in March, 1904, the said Board of Supervisors, without any deterioration in the value of hydrant service and without any deterioration in the value of the use of water for fire purposes or in the value of your orator's property or in the service rendered and to be rendered in that behalf by your orator, but for the purposes and reasons above expressed, and to save municipal money for other purposes and uses, willfully, arbitrarily, unjustly and without cause claimed [30] to reduce said hydrant rate to \$1.00 per month per hydrant, and have, for the same purposes and reasons fixed the same rate ever since, until the adoption of an ordinance to take effect July 1, 1908, in which said hydrant rate was fixed at \$2.50 per hydrant per month, and in the ordinance to take effect July 1, 1909, the hydrant rate was fixed at \$2.50 per hydrant per month, and in the ordinance to take effect July 1, 1910, the hydrant rate was fixed at \$2.50 per hydrant per month, and in the ordinance to take effect July 1, 1912, the hydrant rate was fixed at \$2.50 per hydrant, per month.

That the said City and County of San Francisco is, and has been during all the times hereinafter mentioned, and still continues to be, a consumer of water

furnished by your orator, and is a rate payer of your orator and derives nearly all of its supply of water from pipes connected with the mains of your orator herein, and extending into the houses, buildings, hydrants and parks owned or occupied or used by said city and county, and that during all the times since the said acquisition of said works by your orator, said city and county is and has been a customer of your orator and supplied by your orator with water for domestic uses, as well as for said other purposes.

V.

That the purposes of the incorporation of your orator were and are, among other things, to supply said city and county and its inhabitants with pure fresh water; that your orator has a franchise for that purpose, although it is not, and never has been, an exclusive franchise and [31] does not constitute and never has constituted a monopoly of the right to furnish water to said city and county and its inhabitants. That for many years last past the grantor of your orator and your orator have been and are now supplying the larger portion, or nearly all, of the fresh water consumed by said city and county and its inhabitants, and that there are no water works in said city and county except those owned by your orator, capable of supplying all the water required by said city and county and its inhabitants, and that there are not, and were not at any of said times in this bill mentioned, any municipal or public water works in said city and county or belonging to said city and county, or operated by said city and county, except said County Line Water Property which is claimed to be

owned by said city and county. That the said business of your orator is an established and going business; that it will take at least six years for the establishment of a rival plant, that distributing pipes are connected with its mains to nearly all the houses, places of business and buildings, public and private, in said city, and have been for years, and that its customers in said city and county number many thousands; that the value of its plant is increased by reason of such established and going business by at least \$7,000,000, and that such value is distinct and separate from, and is over and above the actual physical value of said plant for the reasons last aforesaid.

[32]

VI.

That in order to carry out the said purposes of their respective incorporations, the grantor of your orator and your orator have since their respective incorporations acquired reservoir sites, buildings and reservoirs, and obtained riparian and other rights and properties necessary to secure the absolute ownership of water caught and impounded in their reservoirs, and have purchased water rights and have bought large tracts of land for the purpose of obtaining an adequate supply of pure fresh water and of preserving the same in good and potable condition, and have constructed aqueducts and pumping plants and other works, and have laid many miles of large water pipes for conveying the water to said city and county and distributing the same to said consumers, and have purchased and acquired and own other properties necessary and essential in the conduct of their

business and the purposes of their respective incorporations, and that all said properties and rights above referred to have been and are now actually used and are necessary and essential in supplying said city and county and its inhabitants with pure, fresh water, and are now, and ever since said date of September 14th, 1903, have been, owned by your orator, and that the aforesaid rights, lands, works, pipes, improvements and properties are and were at all the times in this bill of complaint hereinafter mentioned, of great value, to wit, of a value very largely in excess of \$50,000,000. [33]

VII.

And your orator further alleges that in order to procure funds required in acquiring water rights and other properties necessary in the conduct of said business, and in constructing its works and in making the improvements necessary and essential for the purposes of their respective incorporations, the grantor of your orator and your orator have, during the last forty years, been compelled to borrow, and have borrowed, in addition to funds furnished by the stockholders of your orator's grantor and of your orator in renewing its indebtedness large sums of money, amounting in the aggregate to more than \$19,140,000, and that your orator has now an aggregate outstanding interest-bearing indebtedness, secured by mortgage on its property, of \$20,987,000, made by it and by its grantor, and assumed by it, and that the interest upon said mortgage indebtedness and other indebtedness which will accrue and will be necessary to be paid during the fiscal year ending June

30, 1913, will amount in the aggregate to not less than \$760,000.

VIII.

And your orator alleges upon its best information and belief that, during the said fiscal year ending June 30, 1913, the operating expenses of your orator, which will actually and necessarily be incurred in operating its works in actual use for the purpose of its said business, and in carrying on its said business, will amount to \$874,913, or more, exclusive of and in addition to depreciation, obsolescence, and a proper allowance for replacement of portions of the plant liable to be destroyed by extraordinary casualty.
[34]

IX.

And your orator alleges, upon and according to its best information and belief, that during the said fiscal year ending June 30, 1913, and before the expiration thereof, it will be compelled to pay the sum of Four Hundred and Fifty Thousand Five Hundred and Sixty (450,560) Dollars, or more, as state and city and county and county and school and federal taxes levied upon its property for that year, and that it will be compelled to pay the sum of Four Hundred and Thirty-five Thousand and Forty-one (435,041) Dollars, or more, as state and city and county and county and school and federal taxes levied upon its properties used and useful in supplying the City and County of San Francisco and the inhabitants thereof with water.

X.

That the amount of the issued capital stock of your

orator is, and was at all the times hereinafter stated, \$28,000,000, divided into 280,000 shares of the par value of \$100 each, and is owned and held by approximately 1300 shareholders.

That since the calamity caused by the fire and earthquake of 1906, the stockholders of your orator have paid to it for use in the operation of its plant, and repair of the same occasioned by said earthquake and fire, the sum of \$3.00 per share, or a total of \$840,000, on its capitalization of \$28,000,000, represented by 280,000 shares; that the stockholders of your orator's grantor furnished for the purchase and construction of the works now included in the works owned by your orator, and so actually in use in supplying water, a sum largely in excess of the par value of all the 140,000 shares of your orator's grantor, and that the cost of said properties and works of your orator, so actually in use, largely exceeds the aggregate sum or par value of said stock of your orator's grantor, to wit, \$14,000,000, and all [35] said outstanding bonded indebtedness and, as a fact, the value of the properties and works owned by your orator exceeds the aggregate sum of the par value of your orator's stock and all said outstanding bonded indebtedness. That the usual rate of annual interest or income to be allowed in San Francisco for permanent investments in dividend-paying stock of the character of the stock of your orator is not less than six to seven per cent upon the value thereof, even if calculated at the said sum of \$14,000,000, and that the holders of the stock of your orator are justly and reasonably entitled to receive dividends upon their said stock at

not less than six to seven per cent per annum upon said last named sum, though the value of the property is much greater, as above stated, than said last named sum, and that seven per cent per annum upon the value of its property is a fair remuneration in the premises, plus operating expenses, taxes and a proper allowance for depreciation and obsolescence, and a proper allowance for the replacement of portions of its plant liable to be destroyed by extraordinary casualties, and that your orator is fairly entitled to have and receive, as rates for water supplied by it to said City and County of San Francisco, and its inhabitants, an income which will realize at least seven per cent upon the actual value of the actual property in use in furnishing and supplying said water, and, in addition thereto, its actual operating expenses and the amount of taxes levied for state and city and county and county and other purposes, and an annual sum or per cent for depreciation of its plant in the premises and [36] for obsolescence and to replace portions of its plant liable to be destroyed by extraordinary casualties, and that the value of its franchise and the value of its established and going business are, and should be, a part of such actual value and should be added to the value of said properties.

XI.

That among the properties comprised in the plant of your orator, used and necessary to be used in supplying the City and County of San Francisco and its inhabitants with water, are machinery, flumes, chutes, gates, buildings, pipes, trestles, screens, fences and tanks of the value of more than eighteen million dol-

lars. That these portions of the plant are subject to depreciation. That it is common practice in all well-managed companies, to make an annual allowance for insurance against destruction by fire or other casualty, for depreciation, ageing and wearing out and obsolescence of plant, and to provide a fund for replacing such property when destroyed or worn out, or when it has become obsolete, for there is continually in progress in all such plants a waste and depreciation, which is due to its use, the ravages of time, and the action of the elements. A portion of this wear and decay can be offset by ordinary repairs. All of the property which thus wears out or decays must be replaced sooner or later, if the integrity of the plant is to be maintained, and the cost of replacing the portions of the plant so decayed or worn out by use enter into the cost of furnishing, supplying and delivering water. To maintain a plant for the furnishing of water, and to maintain the plant of your orator, it is necessary [37] to provide for two items, namely: (1) Ordinary annual repairs; and, (2) replacement of worn-out or obsolete portions of the plant. The necessity of making an annual allowance to cover depreciation and obsolescence arises from the fact that the second item of maintenance above mentioned, namely, replacement of worn-out or obsolete portions of the plant, must be made periodically rather than annually, although the actual wearing out resulting from use is constantly progressing. The replacing of worn-out and obsolete portions of the plant, as necessity arises therefor, is as essential to the maintenance of the plant in its integrity as is

the making of current repairs. The practice of making an annual allowance for depreciation and obsolescence has become so well established, and is so clearly necessary and right, that the public service commissioners of many states, in the instructions which they have issued in relation to the keeping of accounts and making reports by public service corporations, expressly provide for a separate statement of such items, and the term "obsolescence" is now generally accepted by accountants as the proper term to indicate the loss resulting from discarding plant and machinery before it is worn out, and the substitution therefor of improved plant and machinery, by means of which water can be more economically furnished and supplied. That the life of said portions of your orator's plant hereinbefore referred to is limited, and that the amount of the annual depreciation of such portions exclusive of and in addition to ordinary annual repairs, is more than \$260,000, which sum is a cost and expense incurred by your orator annually in supplying water to the City and [38] County of San Francisco and its inhabitants, and will be incurred and suffered by your orator during the fiscal year beginning July 1, 1912, in supplying water to said City and County of San Francisco, and its inhabitants. That such annual depreciation does not affect the ability of your orator to render the service needed by the City and County of San Francisco, and its inhabitants, but, as hereinbefore alleged, constitutes an annual expense of your orator in rendering such service.

That, in addition to such annual depreciation, your

orator is entitled to an allowance for obsolescence to enable it to replace portions of its machinery, and apparatus, for which new machinery and apparatus should, from time to time, be substituted in the interest of economical administration and operation. That the pumping and other machinery and apparatus used by your orator in supplying, furnishing and distributing water are of such a character that they become obsolete and have to be entirely replaced by newer and more efficient machinery and apparatus, as the result of new discoveries, inventions and improvements in the business of supplying, furnishing and distributing water, and in the interest of, and in order to effect, economical administration and operation.

That your orator is also entitled to an allowance to cover extraordinary casualties and contingencies, such as the earthquake of April, 1906, and losses by fire. That for the public to deprive your orator of all opportunity to anticipate or recoup losses occasioned by fire, earthquake or other casualties, by prescribing rates containing no allowance from which such losses can be paid, necessarily is to deprive your orator of its property and of its liberty [39] to make contracts concerning its property without due process of law, and to deny to your orator the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, for all persons, except those for whom rates are prescribed by law, are permitted, if opportunity be afforded, to anticipate and recoup such losses at will and without restraint of law.

That to cover, provide and compensate your orator for obsolescence and losses liable to be caused by extraordinary casualties, it is entitled to an allowance, in the rates adopted by the Board of Supervisors, of at least forty thousand dollars per year. That of this sum twenty thousand dollars should go to the credit of obsolescence, and twenty thousand dollars to the credit of an account to provide for losses occasioned by earthquake, fire and extraordinary casualties. And your orator alleges that a reasonable amount to provide for obsolescence is the sum of twenty thousand dollars per annum, and that the amount necessary to provide annually for losses by earthquake, fire and extraordinary casualties is twenty thousand dollars, and that said amount is reasonable.

That the total cost of pumping and other machinery, subject to obsolescence and included in the plant of your orator, is more than fifteen hundred thousand dollars.

That in adopting said ordinance, copy of which is marked Exhibit "A," and in establishing the rates therein, defendants failed to consider, or make any allowance for, depreciation, or for obsolescence, or for extraordinary casualties or contingencies, and that, in fixing the said [40] rates, defendants refused to allow any amount or sum for depreciation or for obsolescence or for extraordinary casualties or contingencies, and that said defendants did not, in determining the rates set forth in said ordinance, allow, nor did they make any allowance for, the depreciation of any portion of your orator's plant for

the fiscal year beginning July 1st, 1912, the sum of \$260,000, or any other sum whatsoever, and did not allow any sum or amount whatever for obsolescence, or for extraordinary or other casualties or contingencies.

XII.

That, on the 18th day of April, 1906, an earthquake occurred, which destroyed portions of the property owned by your orator, used in, and which were necessary for use in, supplying the City and County of San Francisco and its inhabitants with water. That said earthquake was of unusual severity, and caused the destruction of much other property in, and in the vicinity of, San Francisco. That said earthquake was an extraordinary casualty, and one which could not have been anticipated, and was not anticipated, by your orator nor by any other property owner in the district or territory affected by said earthquake.

That said earthquake was followed by a conflagration which lasted for several days and destroyed all the buildings and structures in a large section of the city and county. Said earthquake and fire are frequently referred to as the calamity of April, 1906, and are so referred to herein.

That your orator replaced portions of said plant destroyed by said earthquake, all of which replacements were necessary in order to enable it to supply to the City [41] and County of San Francisco and its inhabitants, the water required by them, and ever since said replacements were made they have actually been used, and are now being used, and are neces-

sary to be used, and will in the future be necessary, in supplying to said city and county, and its inhabitants, the water they require. That said replacements cost Six Hundred and Eleven Thousand Three Hundred and Thirty-six and $31/100$ (611,336.31) Dollars, all of which has been paid by your orator. That in adopting said ordinance herein referred to, copy of which is marked Exhibit "A," and in establishing the rates specified therein, defendants refused to consider or to give any credit for, or weight to, the cost of said replacements, or to give your orator any consideration whatsoever therefor, and expressly determined that your orator was not entitled to have said replacements, or the cost thereof, considered in determining the rates to be collected for water furnished during the fiscal year beginning July 1st, 1912. That the rates allowed by the Board of Supervisors of said city and county in the ordinances passed from the year 1903 to the year 1911 have not been sufficient to provide, and that your orator has not collected or received, even the lowest current rates of interest on the value of the property of your orator used, and necessary to be used, in supplying to the City and County of San Francisco, and its inhabitants, the water required by them, and that said rates have not been, nor has your orator received, a sufficient amount to reimburse it for the expenses incurred in making necessary or any replacements. That the moneys to pay the cost of such replacements, made necessary by the damage caused by said earthquake, were obtained by your orator through and by [42] means of an assessment of three dol-

lars per share levied upon its capital stock and paid by its stockholders.

XIII.

That the rates collected by your orator since the first day of April, 1906, have not been sufficient to enable it to pay any dividends to its stockholders, except as herein alleged and none have been paid since that date, except as herein alleged, but, on the contrary, your orator has levied an assessment of three dollars per share upon its capital stock, amounting in the aggregate to eight hundred and forty thousand dollars, all of which was paid by its stockholders. That said eight hundred and forty thousand dollars was used to pay the cost of replacing portions of its plant and property destroyed by earthquake, as hereinbefore alleged, and to pay interest on its bonds and its current expenses.

That the rates fixed by the ordinance passed by the Board of Supervisors of the City and County of San Francisco during the year 1907, and to take effect on the first day of July of that year, would not have returned or yielded to your orator an income equal to two per cent on the value of its property used in supplying said city and county and its inhabitants with water over and above its operating expenses and taxes, leaving entirely out of consideration any charge for replacing any portion of its plant destroyed by extraordinary casualties.

XIV.

That your orator is entitled, under the provisions of the Constitution of the United States to have rates for supplying fresh water to said city and county, and its inhabitants, so fixed that it may receive from

and under such [43] rates a reasonable and just compensation and fair remuneration for the services rendered, and based upon the actual value of the actual property in use by it in rendering such services and in supplying such water; and that if so fixed the aggregate annual income of your orator from such rates, with said operating expenses and taxes, and an allowance for depreciation and obsolescence and to replace portions of its plant destroyed by extraordinary casualties, should amount for said fiscal year ending June 30, 1912, to more than the sum of \$3,210,000. That after said calamity of April, 1906, the average consumption of water was for a time in the neighborhood of twenty-nine million gallons per day; that before said calamity the average consumption was from thirty-two million to thirty-three million gallons per day, and now is over thirty-seven million gallons per day.

XV.

That ever since its incorporation to the present time your orator has complied with the Constitution of the State of California and all the laws of the State of California in all the premises respecting the matters hereinbefore and hereinafter set forth, and in the performance of its duty in furnishing pure fresh water to said city and county, and its inhabitants, and that, ever since its incorporation and down to the time of the acquisition of said works by your orator, the grantor of your orator did likewise.

XVI.

That it is provided in and by the fifth amendment to the Constitution of the United States that no per-

son [44] shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, and that by the fourteenth amendment to the Constitution of the United States it is further provided that “no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law”; and your orator alleges that this action is a case in equity arising, and that it arises, under the Constitution of the United States, and that the judicial power of the Honorable Court, above-entitled, extends to and embraces this action and its issues, as your orator is informed and believes, and that the issues herein and in this action set forth involve federal questions under said Constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel your orator to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the said provisions of said Constitution of the United States, and by reason of and under said provisions are void and null; and that under said

ordinance your orator would, and will, be compelled to furnish water to said city and county and [45] its inhabitants at less than the fair, reasonable and just value of the service rendered, and that by the enforcement of said rates and said ordinance your orator would be and will be deprived of property without due process of law, and will be deprived of property without any process of law, in violation of the provisions of the Constitution of the United States; and that by such enforcement its property would be and will be taken for public use without just compensation and, in some instances, without any compensation, and that by such enforcement the privileges and immunities of your orator would be and will be abridged and the equal protection of the law denied to it, in violation of the provisions of the Constitution of the United States. And your orator further alleges that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of \$5,000.

XVII.

That in and by the Constitution of the State of California, it is specifically and in direct terms, among other things, provided and enjoined that rates for supplying water, or compensation, shall be fixed in the following (and that they can be fixed in no other) manner, to wit: "Annually by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body." And your

orator alleges that the said Board of Supervisors did, on the 24th day of June, 1912, pass a certain bill or ordinance, fixing the maximum rates to be charged; for furnishing water to the [46] City and County of San Francisco for the fiscal year commencing July 1, 1912, and that a true and full copy of said bill or ordinance is annexed to this bill of complaint, made a part hereof as though incorporated herein at length, and marked Exhibit "A," and that defendants threaten to and will enforce said ordinance for said fiscal year against your orator unless restrained by your Honors and said Court, and will thereby deprive your orator of its property without due process of law, and will take your orator's private property for public use without just compensation, and in some instances without any compensation, and will enforce said law or ordinance, and will thereby abridge the privileges and immunities of your orator and deny to, and deprive it of, the equal protection of the law, in violation of the provisions of the Constitution of the United States.

XVIII.

That said bill or ordinance, Exhibit "A," fixes the rates to be charged for supplying water to the said city and county and its inhabitants for said fiscal year 1912-1913, but that the same was adopted without due process of law and not according to the provisions of law and in a manner that deprived and deprives your orator of the equal protection of the laws for the reasons hereinbefore and hereinafter stated, and that the rates thereby fixed are wholly illegal and unconstitutional under the said provi-

sions of the Constitution of the United States, and are unauthorized, and if enforced will result in depriving your orator of its property without due process of law.

And your orator alleges that it has acquired, at the cost of many hundreds of thousands dollars, and owns lands, water rights and properties for the reasonable use [47] of your orator in supplying said City and County of San Francisco, and its inhabitants, with water to anticipate such reasonable immediate demand. That such properties are reasonably worth many millions of dollars, and soon will be necessary in such supply, or, at least, progressively so, part by part, but that defendants have arbitrarily and absolutely refused to take such value, or any part thereof, into consideration in any way in fixing the value of your orator's plant or to make any allowance whatever therefor in fixing such value—unjustly and inequitably claiming that your orator should be allowed only for property actually and physically then in use, and not for property acquired for reasonably immediate use, though obtained by actual expenditure presently incurred. That said refusal is unreasonable, unjust and inequitable; that said properties have been acquired in good faith and, as aforesaid, will soon be necessary and prudent for use in such supply, or, at least, part by part; that they have been acquired to meet the demands for such supply and not at an unreasonable time in advance of such demands; that they were acquired when they could be acquired prudently and without delays which, by reason of possible necessity of condemnation pro-

ceedings, might have been extended beyond the times when such demands would be imperative and impossible of fulfillment. That if said defendant, the City and County of San Francisco, were operating its own municipal water works and supply, it would, of necessity, be compelled to acquire properties therefor in advance of use, and to pay interests on the moneys utilized therefor, long before such properties [48] were in actual use and during construction, as well as during acquisition, and that such interest would be paid necessarily from general taxation as the laws of the State of California now exist, and all consumers of water, according as they respectively own assessable property, would be contributing thereto. That it is inequitable to apply to your orator an arbitrary rule in the premises, as has so been done, and compel it to carry said properties at a loss until the actual physical use thereof shall begin and thus treat your orator in a manner different from that with which a municipality engaged in a similar service would be treated. That said properties so acquired are worth many millions of dollars. That the rates fixed by the said bill or ordinance were fixed arbitrarily and at random and by mere guesswork, and were not based upon actual values of the properties, but upon the mere whim of the said Board of Supervisors, defendants herein, and that said Board never did determine or pretend to determine the value of the property of your orator then actually in use or to be used in supplying water for said fiscal year; and that various members of said Board of Supervisors, at the very meeting at which the said

ordinance was to be passed, so stated. That said rates were fixed by the said Board without any consideration of, or regard to, the rights of your orator, or to the reasonable income and revenue to which your orator is entitled, based upon the value of the works actually used by your orator in supplying water to said city and county and its inhabitants, or to a reasonable income or revenue based upon the actual value of the actual property then [49] in use, or used and owned, by your orator in supplying water to said city and county and its inhabitants, and without regard to the amount of said interest-bearing indebtedness or bonds of your orator assumed and owned by your orator or issued by it, or the annual interest thereon, or the actual operating expenses of your orator, or the actual amount of taxes which it will be required to pay, or the right of your orator's stockholders to a reasonable or any dividend upon their said stock, and without any allowance for depreciation of your orator's plant, or for obsolescence, and without any allowance to provide for the replacement of portions of the plant of your orator destroyed by extraordinary casualties, but in total disregard thereof, and without reference to the value of the services in the premises to be rendered by your orator, or any other person or corporation, and without taking into account at all the value of the franchise, or the going and established business, of your orator.

And your orator alleges that said bill or ordinance, and all proceedings of said Board at said meeting on June 24, 1912, in reference thereto, and all of the

meetings of said Board in reference thereto, were and are contrary to and violative of said provisions of the Constitution of the United States and void thereunder, and that therefore said ordinance will, if enforced, deprive your orator of its property without due process of law, and abridge the privileges and immunities of your orator, and deny to it the equal protection of the laws. [50]

That a report showing the value placed by the Circuit Court of the United States upon the properties of complainant as of the year 1903, the price paid by complainant for properties acquired since 1903, which are at the present time used and useful in supplying the City and County of San Francisco, and its inhabitants, with water, and the amount which the City Engineer asserts represents the depreciation of all properties of complainant since the fiscal year 1903-04, to June, 1912, but explicitly stating no appreciation in the value of your orator's property was considered,—was filed with the said Board of Supervisors by Marsden Manson, City Engineer of the City and County of San Francisco, on June 7, 1912, but that said Board has failed to allow a reasonable return upon even the value so reached by said Manson.

That said Board of Supervisors refused to consider one important element of value of your orator's property, to wit, its established business. That said element is of the value of more than seven and one-half million dollars, and your orator was entitled to have said element taken and treated and considered as of that value by said Board of Supervisors in fix-

ing and establishing rates for said fiscal year. That in a report made by C. E. Grunsky, City Engineer, in 1903, in which said Grunsky fixed a valuation upon the property of your orator, he valued its established business at one million four hundred thousand dollars, and the remainder of its property used in supplying the City and County of San Francisco and its inhabitants with water at twenty-four million one hundred and twenty-four thousand three hundred and eighty-nine dollars, but that the said Board of Supervisors, in fixing and establishing [51] said rates set forth in Exhibit "A," did not allow, but refused to allow, to your orator any value at all for such established business.

XIX.

That said bill or ordinance is, and the rates purported to be fixed thereby are, wholly void, null, unjust, unreasonable, fraudulent and unconstitutional under the said provisions of the Constitution of the United States, and oppressive and confiscatory and ambiguous, uncertain and unintelligible and that the said rates do not permit of, or provide for, a just or fair or reasonable compensation for water to be supplied during said year by your orator, or any other person, to said City and County and its inhabitants, and that if said bill or ordinance is enforced your orator's gross income for said fiscal year, after deducting operating expenses and taxes, a proper charge for depreciation and obsolescence, and a proper charge for replacement of portions of your orator's plant which may be destroyed by extraordinary casualty, will be insufficient to pay any dividend what-

ever during said fiscal year to the stockholders of your orator in excess of two per cent upon the value of the property of your orator necessary to be used in supplying water to said City and County and its inhabitants.

XX.

That said rates are unreasonable, unjust, unfair, confiscatory, arbitrary, unintelligible, uncertain and ambiguous. That a reasonable return to your orator in the premises is seven per cent per annum on the value of the property actually in use, plus operating expenses, taxes, and a fair allowance for depreciation and obsolescence, [52] and a fair allowance to provide for replacement of portions of its plant which may be destroyed by extraordinary casualty, and that said rates last mentioned are unwarranted, unjust, unfair, oppressive and illegal and deprive your orator of property without due process of law; that said board in said determination of said rates assumed that your orator's business would, by increase of consumption of water, be larger than in the prior fiscal year without regard to the value of its properties in use or the value of the extra service to be rendered. That defendants intended by such rates to, and will, if such rates are enforced, wholly deprive your orator of the value and the income of such increase in business, if any, without taking into account the extra service to produce the same, or, if none, then by such assumed increased amount of income from such increased business reduce the present income of your orator. That said board could not determine and did not determine that there could be or

would be any increase in income from new business during said coming fiscal year 1912-1913 and could not rightfully, for the reasons aforesaid, or for any reasons, make any deduction for that purpose; that an ordinance establishing rates in the manner aforesaid is not a fixing of rates according to the value of the property in actual use, or according to the value of the service rendered, but is an arbitrary, willful, fraudulent and unjust act and a deprivation of property, against your orator, and deprives it of the legal right to the profit of increase of business, if any, which must only result from, and be based upon, extra service and a larger supply of water, and is a fixing of an estimated revenue and not fixing of a rate or rates, or of rates based upon any [53] legal, equitable or reasonable grounds, but on an unjust and haphazard assumption that an increase of business will occur without use of extra water and extra expenditures to accomplish the same.

XXI.

And your orator further alleges that section 11 of said Exhibit "A" is also unreasonable, unjust and unconstitutional under the Constitution of the United States, and confiscatory, and is greatly inadequate as to compensation for the services therein contemplated, and that such services therein mentioned are reasonably, fairly and justly worth the sum of much more than five dollars per hydrant per month, and that the value of the property of your orator actually in use by it for this part of such service, over and above and in excess of the value of the property of your orator required and necessary for all domestic

and all other uses of water supplied by it in the premises, is largely in excess of the principal sum which, even at five per cent per annum income, would produce said rate or revenue of five dollars per month per hydrant.

That the said Board of Supervisors in February, 1900, passed an ordinance fixing, among other things, in [54] the premises as reasonable and just, considering the services rendered and to be rendered and the actual value of the property in use therefor in the premises, the rate for said hydrants at five dollars per month per hydrant; that since February, 1900, the value of said service per hydrant has not diminished, and the said property actually in use therefor has not been diminished but has been increased by large additions, and that the actual value of said service per hydrant, considering said additions, has not decreased in any respect whatever, but is larger than in February, 1900, and that at said rate of five dollars per month per hydrant the income of your orator from hydrants, for the fiscal year, ending June 30, 1913, would, according to its best information and belief, be (under normal conditions) at least \$132,000 more than under said hydrant-rate fixed by said ordinance, Exhibit "A." That the service by such hydrants is to a large extent a separate and distinct and different service from, and an additional service to, and in some particulars a larger service, that is to say, by larger mains or pipes, than, the service for domestic and all other uses, and requires in numerous cases larger pipes or mains, and in some cases separate pipes and mains and cannot thus in various and

many respects be deemed an integral part of the general service and plant, and compensation therefor cannot be justly to your orator agglomerated with general service rates, or be reduced at the will of said Board to practically little or nothing without great inequitable and unconscionable injury to your orator. That such service [55] is of such a separate character that its value should be reasonably established as a distinct service and a unit.

XXII.

And your orator further alleges that the said defendant, the Board of Supervisors, in making said rates for the fiscal year 1912-13 did the same with the purpose, as your orator verily believes, by means of said ordinance so passed in June, 1912, of depreciating the value of the property of your orator, and of crippling it in its financial condition so that the defendant, the City and County of San Francisco, could buy the property of your orator at far less than its actual and reasonable value. That said defendants have repeatedly stated that the interests of the City and County of San Francisco, and its inhabitants, demand and require the acquisition by said City and County of San Francisco of the property of your orator, used in supplying water to the City and County of San Francisco, and its inhabitants; that, as your orator is informed and believes, the said defendants, members of the Board of Supervisors of the City and County of San Francisco, recognize and admit that the rates fixed by said ordinance, Exhibit "A," are inadequate to the service which will be rendered by your orator and are unfair to your orator,

and said defendants were actuated to pass, and did pass, said ordinance for the purpose of discouraging your orator from continuing in the ownership and administration of said property, and because of the fear expressed by many of said defendant supervisors that the fixing or establishing of higher rates than those [56] to be fixed and established by said ordinance would embarrass and be detrimental to the said City and County of San Francisco in litigation pending between your orator and said City and County of San Francisco, in which is involved the validity of other rate ordinances passed by the Board of Supervisors of said City and County of San Francisco, and would embarrass and be detrimental to the said City and County in conducting negotiations for the purchase of the properties of your orator.

XXIII.

And your orator alleges the fair and reasonable value of the services of your orator, to be rendered for said fiscal year 1912-13 to the said City and County and its inhabitants, will be at least \$3,210,000, inclusive of taxes, operating expenses and a proper allowance for depreciation of the plant from natural causes resulting from its use, and for obsolescence and a proper allowance to provide for replacement of portions of its plant which are liable to be destroyed by extraordinary casualties and an income of \$3,210,000 will not yield a fair rate of interest or remuneration by way of dividends to its stockholders upon the value of its property actually in use. That such allowance for depreciation, obsolescence and for replacement, made necessary by extraordinary cas-

ualties is a proper part of general rates to be collected by your orator.

That the water furnished and supplied by your orator is of exceptionally pure, fresh and wholesome quality, and that the property and sources of water supply and the plant of your orator are fit and ample to meet and exceed the reasonable requirements of said city and county and its inhabitants in the present and future under all conditions. [57]

XXIV.

That the said City and County and the said defendants, and each of them, have threatened and are threatening to enforce said bill or ordinance, Exhibit "A," and to prevent your orator from collecting any other rates for supplying water than those prescribed therein, and your orator alleges upon its information and belief that if it shall fail or refuse to conform to the rates therein prescribed defendants will, unless restrained by this court or your Honors, enforce or attempt to enforce the said bill or ordinance and the rates thereby fixed and will, in case of your orator's failure to observe said rates, attempt the forfeiture, or cause proceedings to be taken for the forfeiture, of its franchise and works. That the Board of Supervisors have already, in reference to the ordinance of February, 1906, attempted to pass and to record in the various counties where your orator's property is situated, a resolution which the Board of Supervisors claimed forfeited the entire plant of your orator to the City and County of San Francisco for public use for that your orator did not collect rates for the fiscal year 1906-1907 in accordance with

the ordinance passed for that year in February, 1906, and your orator alleges that said last named ordinance was and is void, and void on its face; and that by such threats and threatened action, and the acts under such threats, your orator suffered and sustained great damage and injury. Long after the passage of said resolution for the forfeiture of your orator's property said Board of Supervisors passed another resolution purporting to rescind said first named resolution, but notwithstanding [58] said rescission your orator suffered and sustained great damage by the passage of said first named resolution.

That unless it is permitted to collect such rates as will produce a fair, reasonable and just income your orator will unjustly be further irreparably damaged in the premises and will be compelled to refuse to supply water to said city and county or its inhabitants, or either of them, on the ground that said bill or ordinance so finally passed June 24, 1912, is null and void, or will be compelled, on the ground that its business is unprofitable and is run at a loss, to sell its water elsewhere than in said city and county, or to sell all of its properties to pay its bonded indebtedness, and for the purpose of paying or distributing among its stockholders a reasonable value for said stock upon its surrender and the disincorporation of your orator.

XXV.

That it is essential, meet, right, proper and necessary to the rights of your orator, present and future, that this court or your Honors by decree determine what property of your orator is in actual use in such

supply of water by it and what the value thereof is, including such franchise, and such established and going business, and also to determine the amount of annual depreciation of the property of your orator by natural use and wear and tear, and an allowance for obsolescence, and the amount to which your orator is entitled to replace portions of its plant which may be destroyed by extraordinary casualty, and what is a reasonable and just income to it, based upon such value, and what is a reasonable amount to be allowed for taxes and [59] operating expenses, and what is the fair value of the services that might be rendered by your orator in the premises for said fiscal year 1912-13, and also what is the value of the property of your orator already acquired for reasonably immediate use and what income should be allowed therefor.

XXVI.

And your orator alleges that each, all and every provision of said ordinance, Exhibit "A," is unjust, unfair, unreasonable and confiscatory and opposed to and prohibited by the provisions of the Constitution of the United States hereinbefore set forth or referred to, and is also uncertain, ambiguous and unintelligible, in that it is unjust, unfair and confiscatory, and that the provisions of said ordinance are inconsistent and are in conflict with one another.

And your orator further alleges that the provisions in said ordinance, Exhibit "A," to the effect that upon the application of any ratepayer, the Board of Supervisors shall preserve the right, upon a proper showing of cause, to require the company to put in

a meter and charge meter rates for any consumer of water, is unjust, confiscatory and unfair, and opposed to said provisions of the Constitution of the United States; and is also not a fixing of rates by the said Board, and applies to all ratepayers for payment of water rates to your orator if the Board shall so decide in the future; and is also ambiguous, unintelligible and uncertain for that it nowhere appears in said ordinance what such showing must be, but the same is left discretionary with said Board at any time during the fiscal year 1912-13 by [60] the said provision to fix another and a different rate for any ratepayer or for all ratepayers, viz., a meter rate, and is inconsistent with and opposed to a provision in section 12 of said ordinance whereby it is provided that in no case where fixed rates are provided, other than meter rates, shall water be charged at meter rates; and thereby it is also declared to be the purpose of the ordinance to provide for all dwelling-houses a fixed monthly rate which shall not be increased by the person, company or corporation supplying water, while such provision may result in a large decrease to anyone or to all consumers of water in dwelling houses, and thus produce a smaller income than was intended to be produced by said ordinance.

That said ordinance is further unfair, unjust, confiscatory and opposed to the provisions of the Constitution of the United States in the respects hereinabove set forth in that the said ordinance provides that no consumer shall be deemed guilty of waste or excessive use unless the amount of water used on his premises in any month shall exceed 50 per cent the

number of cubic feet which at regular meter rates amounts to his rated bill, and that nothing shall be deemed to be waste or excessive use until after it has passed the 50 per cent limit of the meter bill rate, and thereby said ordinance is intended to and does provide that a consumer shall be allowed free of charge to use and consume the property of your orator to the extent of 50 per cent above his regular rate by meter without payment.

And your orator further alleges that said [61] ordinance is unfair, unjust, confiscatory and opposed to the Constitution of the United States aforesaid, in the particulars aforesaid, in that it provides that after notice by mail of the discovery of waste or excessive use to the consumer your orator may charge such consumer for excessive use as therein provided and not before, and thereby deprives your orator of the rate for the water which was consumed or used by the consumer as waste or excessive use; and is also unfair, unjust, confiscatory and opposed to the provisions of the Constitution of the United States in the respects aforesaid, because the said ordinance Exhibit "A," provides that, no matter how large or how great such waste or excessive use may be or exceed, according to the other provisions of said ordinance, the regular rates provided for each individual or class of individuals, your orator shall not collect for the same, that is, said waste or excessive use, in excess of two dollars for the first month, four dollars for the second, or five dollars for any following month, though said waste or excessive use may exceed by many dollars or hundreds of dollars the amount

which the consumer according to the terms of said ordinance would be compelled to pay.

XXVII.

And your orator further alleges that in an action brought and then pending in the Superior Court of the City and County of San Francisco, State of California (which was then and is a court of record and of general jurisdiction and had jurisdiction in the premises), to set aside an order or ordinance passed in February, 1889, by the then Board of Supervisors establishing water rates, wherein the [62] said grantor of your orator was plaintiff and the City and County of San Francisco, aforesaid, and the Board of Supervisors of the said city and county, and the individual members of said Board, were defendants, on July 20, 1889, a judgment was duly given, made and entered in favor of the plaintiff against all the defendants, wherein and whereby it was found, adjudged and decreed, among other things, that at the date of the commencement of said action, to wit, on or about the 5th day of April, 1889, the value of the property of the grantor of your orator up to that time acquired, obtained, constructed and owned by said grantor in order to carry out and necessary to enable said plaintiff to fulfill the purpose of its incorporation, and in use by said plaintiff therefor, to wit, to supply the said City and County of San Francisco and its inhabitants with pure, fresh water, was then, to wit, in April, 1889, of a value exceeding \$25,000,000, and that said defendants therein appealed to the Supreme Court of the State of California from such judgment and on such appeal, such

judgment was affirmed in or about the year 1890, and then became and ever since has been and is final and in full force and effect, and was then and ever since has been and still is *res adjudicata* as to and upon the question (among other things) of such value as the sum aforesaid, to wit, a value exceeding \$25,000,000, at and on said day. That such judgment as to and upon the value aforesaid, and other things, was upon the merits in said action, that is to say, upon the law of the case upon the admitted facts alleged in the complaint, and that such value and the determination thereof was actually and necessarily included in said action and in said judgment and necessary thereto and to each thereof, and that [63] said judgment is an estoppel against each and all the defendants in this action upon said question and issue and fact of the value of said property in this paragraph above referred to, that is to say, a value exceeding \$25,000,000 at said date, of the property then owned by the grantor of your orator; and ever since and now and by said judgment defendants in this action are, and at all times in this bill of complaint referred to were, estopped and debarred from placing any other or different or smaller value thereon. That all said properties were on June 20th, 1911, and ever since and now are owned by your orator and, with large additions thereto, are engaged by your orator in such supply of water; that said properties referred to in said action, and said other properties, have largely increased in value since April, 1889, to wit, by an increase in value of a sum very largely in excess of twenty-five millions of dollars, and have ever since

been by your orator and its grantor used in such supply of water. That since the commencement of said action your orator and its grantor have acquired, obtained, constructed and owned other like properties for the same purpose, and necessary therefor, and since said acquisition, and in June, 1910, and ever since and now owned by your orator for the purposes of said water works in the reasonably immediate future, and are of a value very largely in excess of seven and one-half million dollars. That the true and actual present value of all said properties is a sum in excess of \$45,000,000 for property actually in use. That your orator has acquired, since the first day of July, 1904, certain properties which are now used and useful in supplying the City and County of San Francisco with water and that it paid for said properties the sum of \$5,105,377.65.

XXVIII.

That neither the Constitution of the State of [64] California nor any of the laws of said State, nor said Charter, nor any ordinance of said city and county, nor any of the rules or regulations of said Board of Supervisors, either in June, 1912, or before, or since, provide or provided in any way for, or now provide for, any notice of any kind (in the premises as to the fixing of water rates) to any person supplying water in said State to the public, or in said city and county and its inhabitants, and that section One of Article XIV of the Constitution of the State of California is void and of no force or effect for that reason, and that said ordinance so passed thereunder is likewise void for that reason, and by reason

of said provisions of the Constitution of the United States for that by and under said Constitution of the State of California and said ordinance your orator is denied the equal protection of the law, and its property is taken without due process of law and the same abridge the privileges and immunities of your orator, as guaranteed by the Constitution of the United States.

XXIX.

And your orator further alleges that the rates payable by said defendant, the City and County of San Francisco, are, as it is informed, and believes, payable out of the general fund of said city and county, and that the said defendant Supervisors will, as your orator is informed [65] and verily believes, by a pretended budget for the fiscal year commencing July 1, 1912, and ending June 30, 1913, in making the levy of taxes, for said fiscal year, pretend to set aside for payment for water used by said city and county only a sum of money based on said rates in said ordinance, to wit, Exhibit "A," and intend to and will, unless otherwise directed by your Honors, reserve only said payment, that is to say, a sum of money based upon the rates set forth in said Exhibit "A," for the payment of all water so used or to be used as aforesaid during said fiscal year by said city and county, and will, as your orator verily believes, dispose of all other funds in said general fund over and above said last mentioned sum or payment, for other and different purposes than for the payment of said water for said fiscal year, and that said water so to be furnished for said last-named purposes and the services

to be rendered by your orator in said last-named premises are reasonably, fairly and justly worth much more than the said sum, and that if the said general fund be exhausted by the said Board of Supervisors of all sums in excess of said sum, for other purposes, your orator will be remediless in the premises; for that by the laws of said State of California and the Charter of said city and county, the debts and expenses of any one fiscal year cannot be paid from the revenue of any other subsequent fiscal year, and that therefore it is inequitable and unjust that the said Board of Supervisors should exhaust said general fund in excess of said sum, for other and different purposes than for the payment of water and the service last mentioned, and that it is meet and proper that the said Board [66] should by order of this court be compelled, pending this litigation and the judgment and decree therein, to retain and hold from said general fund a sufficient amount thereof to pay your orator for all water at reasonable, fair and just rates to be used by said city and county during the fiscal year 1912-1913, and that \$300,000 is less than a reasonable sum for such water for said fiscal year.

XXX.

That in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, in or about the month of April, 1903, the said Spring Valley Water Works (grantor of your orator as aforesaid), as complainant, commenced an action by filing its verified bill in equity, No. 13,395, against the City and County of San Fran-

cisco and the then Board of Supervisors thereof, and the then members thereof, and by such bill, under which process and subpoena were duly issued and served on all of said defendants named in said bill, among other things, complainant sought relief, setting aside as void, unreasonable, confiscatory and unconstitutional said ordinance claimed to have been passed March 9, 1903 (a copy whereof is annexed to said bill as an exhibit, and by reference your orator prays that the same be taken as a part of this bill), and also relief in enjoining *pendente lite* the enforcement of said ordinance; and that under an order to show cause duly issued and served, and after due hearing and presentation by all parties of the facts relevant and pertinent in the premises, and full advisement, the Court did order and direct to be issued its writ and process of injunction staying *pendente lite* all proceedings [67] under and all enforcement of said ordinance, and such writ and process of injunction was duly issued and served on all of said defendants in said action No. 13,395, in the latter part of June, 1903, and ever since has been and still is in full force and effect.

XXXI.

And your orator further alleges that in an action in the same court in equity, Number 13,598, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, wherein the bill of complaint was filed in said court on the 1st day of June, 1904, it was, after full hearing, determined by the Court, on motion for an in-

junction, *pendente lite*, to grant the same, and the same was granted, upon the same grounds as in said action 13,395, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the said litigation in said case, No. 13,598. And your orator further alleges that on the 2d day of May, 1905, in an action in said court, in equity, No. 13,756, wherein your orator was complainant, and the then Board of Supervisors of said city and county and the then members thereof were defendants, an injunction *pendente lite* was granted by consent on the same grounds as in the said two prior cases. That said three last named actions were, in November, 1911, determined, adjudged and decided, and that the said court rendered its decree and made its order that the said ordinance complained of was unconstitutional and void. That it is meet, equitable and right that an injunction *pendente lite* in this case, of the same form as [68] in the said three cases, should be by the Court granted. And your orator alleges that the ordinance passed in March, 1906, by the said Board of Supervisors, was not contested for that the same on the face of the proceedings was and is void.

And your orator further alleges that in an action in the same court in equity No. 14,275, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 31st day of May, 1907, it was, after full hearing, determined by the Court, on motion for an injunction

pendente lite, to grant the same, and the same was granted, restraining the enforcement of an ordinance adopted by said Board of Supervisors, fixing and establishing rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1st, 1907. That said injunction was granted upon the same ground as in said action No. 13,395, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the litigation. That said action No. 14,275 is still pending in said court and undetermined.

And your orator further alleges that in an action in the same court in equity, No. 14,735, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 22d day of June, 1908, it was, after full hearing, determined by the Court, on motion for an injunction [69] *pendente lite*, to grant the same, and the same was granted, restraining the enforcement of an ordinance to be adopted by said Board of Supervisors to fix and establish rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1st, 1908. That said injunction was granted upon the same grounds as in said action No. 14,275, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the litigation. That said action No. 14,735 is still pending in said court and undetermined.

And your orator further alleges that in an action in the same court in equity, No. 14,892, wherein your orator was complainant, and the City and County of San Francisco, and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 15th day of June, 1909, an *ex parte* application for an injunction *pendente lite* was granted, restraining the enforcement of an ordinance to be adopted by the said Board of Supervisors, to fix and establish rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1, 1909. That said injunction was granted upon the same grounds as in said action No. 14,735, and on the further grounds that it was equitable, proper and right that an injunction should be issued, pending the litigation; that the said action No. 14,892 is still pending in said court, and undetermined, and the said injunction is still in full force and effect. That the ordinance, the enforcement of which was enjoined and restrained [70] in said action No. 14,892, to fix and establish the same identical rates as were fixed and established by the ordinance, the enforcement of which was so restrained and enjoined in said action No. 14,735.

And your orator further alleges that in an action in the same court in equity, No. 15,131, wherein your orator was complainant and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the complaint in which was filed in said court on the 27th day of June, 1910, an *ex parte* application for an injunction

pendente lite was granted restraining the enforcement of an ordinance adopted by the said Board of Supervisors, fixing and establishing rates for water to be supplied to the City and County and its inhabitants for the fiscal year beginning July 1st, 1910; that said injunction was granted upon the same grounds as in said action No. 14,892; that the said action No. 15,131 is still pending in said court and undetermined, and the said injunction is still in full force and effect; that the ordinance, so enjoined and restrained in said action No. 15,131 fixed and established the same identical rates as were fixed and established by the ordinance which was so restrained and enjoined in action No. 14,892.

And your orator further alleges that in an action in the same court in equity, No. 15,344, wherein your orator was complainant and the City and [71] County of San Francisco and the then Board of Supervisors and its then members were defendants, the complaint in which was filed in said court, on the 26th day of June, 1911, an *ex parte* application for an injunction *pendente lite* was granted restraining the enforcement of an ordinance adopted by the said Board of Supervisors, fixing and establishing rates for water to be supplied to the city and county and its inhabitants for the fiscal year beginning July 1st, 1911; that said injunction was granted upon the same grounds as in said action No. 15,131; that the said action, No. 15,344, is still pending in said court and undetermined and the said injunction is still in full force and effect; that the ordinance so enjoined and restrained in said action No. 15,344, fixed and

established the same identical rates as were fixed and established by the ordinance which was so restrained and enjoined in action No. 15,131.

That the ordinances, the enforcement of which was enjoined in said actions No. 14,735, No. 14,892, No. 15,131 and No. 15,344 respectively, fixed and established the same identical rates with the single exception hereinafter noted, as are fixed and established by the ordinance Exhibit "A," except that said ordinances, the enforcement of which was so restrained and enjoined, enacted and established rates to be collected for the fiscal years beginning July 1, 1908, July 1, 1909, July 1, 1910 and July 1, 1911, respectively; whereas, ordinance Exhibit "A" hereto fixed and established rates to be collected for the fiscal year beginning July 1, 1912. [72]

That the property of your orator which will necessarily be used in supplying water to said city and county and its inhabitants during the fiscal year beginning July 1, 1912, includes all the property described in the bill of complaint in said action, in equity, No. 15,344, and therein alleged to be necessary in supplying water to said city and county and its inhabitants during the fiscal year beginning July 1, 1911, and that your orator invested subsequent to May 31, 1911, and since the filing of said bill of complaint in said action in equity No. 15,131, the sum of One Million Two Hundred Sixty-three Thousand Three Hundred Seventeen and $\frac{3}{100}$ (1,263,317.03) Dollars, for extensions and additions to its plant and for new properties, all of which will be used, and will be necessary to be used, in supply-

ing water to said city and county and its inhabitants for the fiscal year beginning July 1, 1912. That the defendants, members of the Board of Supervisors, who voted for said ordinance Exhibit "A," well knew of said injunction last referred to when passing said ordinance, but nevertheless refused to be bound thereby, or to give any heed thereto. That the said defendants, members of said Board of Supervisors, in and by the said ordinance Exhibit "A," did reduce the rates to be collected for water supplied during the fiscal year beginning July 1, 1912, below the rates fixed and established by the ordinances passed in 1908 and 1909, in this: that by the said ordinances passed in 1908 and 1909 the rates for water furnished and delivered to and for shipping were fixed at \$1.50 per one thousand gallons, and by the said ordinance Exhibit "A" [73] the rates for water for shipping are fixed at double the meter rates for water supplied for other purposes, and as a result of this reduction, if your orator is compelled or required to supply water at and under the rates to be fixed by said ordinance, the income of your orator for water supplied for shipping during the fiscal year beginning July 1, 1912, will be \$100,000; whereas, during the year 1908 it was \$127,211.45, and during the year 1909 it was \$141,282.04.

XXXII.

Your orator alleges that according to the estimates made in reference to the amount of money in gross that would be produced during the fiscal year 1912-1913 under said ordinance, Exhibit "A," and by the report of experts familiar with that business, the

same would not be in excess of \$2,755,000; that after deducting therefrom the said estimated amount of operating expenses, depreciation, obsolescence and an allowance for losses by extraordinary casualty and taxes there would remain but \$1,145,046, as the total income under said Exhibit "A" to your orator, while the amount of coupon interest on its present bonded indebtedness at the rate of four per cent per annum amounts to the sum of \$839,480. That said estimate of \$2,755,000 is, as your orator is informed and verily believes, in excess of the income which the rates fixed by said ordinance will produce. That your orator anticipates that it will obtain an income of between fifty and fifty-five thousand dollars during the fiscal year 1912-1913 from the rent of properties in use for supplying the City and County of San Francisco, and its inhabitants, with water. [74]

XXXIII.

And your orator alleges that its term of corporate existence is fifty years from and after the 23d day of April, 1903.

XXXIV.

That your orator has no plain, speedy and adequate remedy at law in the premises.

XXXV.

In consideration whereof and inasmuch as your orator can have no adequate relief except in this court, and to the end that the defendants may make, if they can, full disclosure and discovery of their alleged claims and assertions and rights in the premises, and according to the best and utmost of their remembrance, knowledge, information and belief,

full, true, direct and perfect answer make to the matters hereinbefore stated and charged, your orator brings this action and hereby waives verification to the answer of the defendants.

May it please your Honors to grant unto your orator a writ of subpoena directed to the said defendants, and each and all of them, commanding them on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to this court shall seem proper and be required by the principles of equity and good conscience.

And your orator further prays that this court and your Honors may decree as follows:

FIRST: That said bill or ordinance so finally passed by the said Board of Supervisors on June 24, 1911, is null and void and of no effect.

SECOND: That your orator is entitled to rates for supplying pure fresh water to said city and county, and its inhabitants, for the fiscal year commencing July 1, 1912, and ending June 30, 1913, so fixed that they will [75] in the aggregate afford a just, fair and reasonable compensation for the services rendered, and based upon the value of the property used therefor and of property purchased therefor to be used in the reasonably immediate future, and that will yield a sufficient annual income to your orator to pay its operating expenses and taxes and an annual sum for depreciation of plant and for obsolescence and to provide for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and to realize in addition the rate

of seven per cent per annum upon its property in actual use in so supplying said city and county and its inhabitants, and that such value of such property is at least the sum of \$45,000,000 for property in actual use.

THIRD: And that the court by its mandate or other peremptory process require said Board of Supervisors forthwith to fix rates for supplying water to said city and county, and its inhabitants, for said fiscal year, so that such rates will yield to your orator its operating expenses and taxes and an annual sum for depreciation of plant, for obsolescence and to provide for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and seven per cent per annum income in addition thereto upon the value of properties in use in so supplying water as aforesaid, and at the sum aforesaid, and to afford your orator due notice and an opportunity to be heard before the said Board prior to the final passage of a bill or ordinance fixing such rates, and to allow your orator and others interested to introduce evidence and be heard respecting the reasonableness [76] and the justice of the proposed bill or ordinance.

FOURTH: That each and all of said defendants, and all consumers of water in said city and county be, pending this litigation, and perpetually at the conclusion of the litigation, enjoined from enforcing or attempting to enforce said bill or ordinance finally passed June 24, 1912, and from bringing or causing to be brought or prosecuting any suit or action against your orator, in law or in equity, to enforce

said bill or ordinance, or any forfeiture of your orator's franchise, works or property, or for any other purpose, on account of its failure or refusal to conform to the rates thereby intended to be prescribed, and from any attempt, directly or indirectly, to compel your orator to furnish water at said rates; and that, upon the filing of this bill of complaint, this court or your Honors, by order duly given and made, upon such provisos as may seem equitable, direct the defendants to show cause on a day certain why such injunction should not be issued pending this litigation, and that in the meantime, upon and from the filing of this bill of complaint until the determination of this court or your Honors under such order to show cause, a like temporary injunction and restraining order be granted by the court or your Honors.

FIFTH: That the Court, by its decree, determine what property of your orator is in actual use in such supply of water by it, and what the value thereof is, including such franchise and the fact that such business is an established and going business, and what is a reasonable and just net income to your orator based on such value, and [77] what is a reasonable amount to allow your orator for taxes on such property, and what is the legal basis for determining such amount, and what are reasonable amounts to allow your orator for such annual operating expenses and such annual depreciation of plant, and for obsolescence and for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and that is the reasonable value of the services to be rendered by your orator; and that the court also

determine that your orator is entitled to a reasonable income on said properties so acquired and within a reasonably immediate time to be brought into use in such supply, and what the value of said properties is and what the amount of income therefrom should be.

SIXTH: That this court by its decree adjudge that said judgment, dated July 20th, 1889, in said action in said Superior Court, is *res adjudicata* between your orator and defendants on the value as of that date of said properties described in the said complaint, which said judgment determined the then value of your orator's properties to be the sum of \$25,000,000, and that the defendants, and each of them, are thereby estopped from placing any smaller value thereon as of that date.

SEVENTH: That, pending this action and the decree herein, the court, by its order and injunction, restrain the said defendants, and each of them, and the said Board of Supervisors, from reducing the General Fund of said city and county for other purposes than the payment for the supply of water furnished by your orator under or below a sum which will be sufficient to pay your orator during the fiscal year 1912-1913, reasonable rates for water to be furnished by it to the said city and county. [78]

EIGHTH: That all exhibits filed in said action in equity, No. 13,395, by the said Spring Valley Water Works, and in said other actions subsequently brought by your orator against the City and County of San Francisco and the Board of Supervisors thereof, at the time said actions were brought, may,

for all proceedings in this action, including the pleadings, evidence or testimony, and affidavits, be by the court deemed to be filed herein and to be used as to the court may seem meet.

NINTH: That your orator may have such other and further relief as to this court and your Honors may seem right in the premises, together with your orator's costs of suit.

EDWARD J. McCUTCHEN,
Solicitor for Complainant.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Of Counsel for Complainant. [79]

State of California,
City and County of San Francisco,—ss.

S. P. Eastman, being first duly sworn, deposes and says:

The complainant is a corporation organized and existing under the laws of the State of California. I am the Vice-President of complainant named in the foregoing Bill of Complaint, and as such Vice-President make this verification and affidavit for and on behalf of complainant. I have read the foregoing Bill of Complaint and know the contents thereof, and I state that the same is true of my own knowledge, except as to those matters therein stated on information or belief, and that, as to those matters, I believe the said Bill of Complaint to be true.

S. P. EASTMAN.

Subscribed and sworn to before me this 26 day of June, A. D. 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. [80]

[Exhibit "A" to Bill in Equity.]**BILL NO. 2162. ORDINANCE NO.—.**

(New Series.) Regulating the monthly rates of compensation to be collected by any person, company or corporation engaged in the business of supplying water to the inhabitants of the City and County of San Francisco for family uses, for private purposes, for municipal uses and for all public purposes of said City and County for the year commencing July 1, 1912, and ending June 30, 1913.

Be it ordained by the people of the City and County of San Francisco as follows:

That the monthly rates of compensation for supplying water shall be as follows:

General Rates.

Section 1. For buildings occupied by a single family covering a ground surface of (not including porches):

Square Feet.	One Story.	Two Stories.	Three Stories.	Four Stories.	Five Stories.
0 to 400.....	\$0.22	\$0.27	\$0.36	\$0.41	\$0.45
400 to 500.....	.27	.36	.41	.45	.54
500 to 600.....	.36	.41	.45	.54	.63
600 to 700.....	.41	.45	.54	.63	.68
700 to 800.....	.45	.54	.63	.68	.72
800 to 900.....	.54	.63	.68	.72	.76
900 to 1000.....	.63	.68	.72	.76	.86
1000 to 1200.....	.68	.72	.76	.86	.90
1200 to 1400.....	.72	.76	.86	.90	.94
1400 to 1600.....	.76	.86	.90	.94	.99
1600 to 1800.....	.86	.90	.94	.99	1.03
1800 to 2000.....	.90	.94	.99	1.03	1.08

The foregoing rates also apply to public buildings. No single rate less than twenty-two (22) cents.

For all houses one story in height, covering a greater area than two thousand square feet, there shall be added nine (9) cents for each additional two hundred square feet or fraction thereof, and the further sum of nine (9) cents for each additional story:

Additional Families.

Where a house or building is occupied by more than one family the general rate for each additional family shall be three-quarters ($\frac{3}{4}$) of the foregoing rates, except:

First—Where a house or building is divided into flats, each flat having a separate entrance, and occupied by a separate family, the general rate charged shall be the same for each flat as for a single house of like dimensions.

Second—Where two or more families occupy the same floor the general rates for each family on such floor shall be the rate for the floor surface occupied by such family (the same as for a single one-story house), according to the foregoing table.

Note—The general rate includes water for general household purposes but does not include any of the following specified rates:

Special Rates—Bathing Tubs.

Section 2. Bathing tubs in private houses, each tub, \$0.32.

In public houses, boarding houses, lodging houses, hotels and bathing establishments where meters are not used, each tub, \$0.45.

For Horses and Cows.

Section 3. For each horse, \$0.18; for each cow, \$0.09.

Boarding and Lodging Houses, Etc.

Section 4. Boarding and lodging houses, not including water for baths, water closets and urinals or for water without the houses, shall be charged for each boarder and lodger within the same, in addition to the rates for private families, \$0.07.

Irrigation, Private Gardens, Etc.

Section 5. Irrigation for private gardens and private grounds, one-half ($\frac{1}{2}$) of a cent per square yard; no monthly charge to be less than fifteen (15) cents.

Water Closets.

Section 6. For each valve closet for use of public building.....	\$0.45
For each valve closet for use of private dwelling.....	.22
Privy vaults (connected with sewer)—	
For use of public building, each seat.....	.41
For use of private dwelling, each seat.....	.22

All drain closets to be charged at the same rate as privy vaults.

Urinals and Stationary Washstands.

Section 7. For use of public buildings, each.....	\$0.09
For use of private dwellings, each.....	.05

Building Purposes.

Section 8. Water furnished for building purposes:

Each barrel of lime or cement.....	\$0.14
Each thousand of brick.....	.09

Stores, Banks, Saloons, Hotels, Etc.

Stores, banks, bakeries, offices, warehouses, saloons, groceries, eating houses, barber shops, butcher shops, book binderies, blacksmith shops, confectioneries, hotels, lodging houses, boarding houses, churches, halls, laundries, photograph galleries, printing offices, steam engines, greenhouses, markets, market stalls, horse troughs, soda fountains and other places of business, each to be charged according to the estimated quantity used, from eighty-one cents (\$0.81) to five and 40-100 dollars (\$5.40), or by meter at meter rates.

Fire Pipes.

Section 9. Meters shall be applied to all pipes used specially for fire protection, and monthly bills shall be charged for the same at regular meter rates, provided, however, that the monthly bill shall not be less than fifty (50) cents for each one-half ($1\frac{1}{2}$) inch of diameter of pipe used.

Meter Rates.

Section 10. Water furnished for any and all purposes not embraced in the above shall be supplied by meter at the following rates:

The first 2,000 cubic feet used (between 0 and 2,000 cubic feet) shall be charged for at the rate of twenty-five (25) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 2,000 and 4,000 cubic feet) shall be charged for at the rate of twenty-four (24) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 4,000 and 6,000 cubic feet) shall be charged for at the rate of twenty-two (22) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 6,000 and 8,000 cubic feet) shall be charged for at the rate of twenty-one (21) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 8,000 and 10,000 cubic feet) shall be charged for at the rate of twenty (20) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 10,000 and 15,000 cubic feet) shall be charged for at the rate of nineteen (19) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 15,000 and 20,000 cubic feet) shall be charged for at the rate of eighteen (18) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 20,000 and 25,000 cubic feet) shall be charged for at the rate of seventeen (17) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 25,000 and 30,000 cubic feet) shall be charged for at the rate of sixteen (16) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 30,000 and 40,000 cubic feet) shall be charged for at the rate of fifteen (15) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 40,000 and 50,000 cubic feet) shall be charged for at the rate of fifteen (15) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 50,000 and 60,000 cubic feet) shall be charged for at the rate of fourteen (14) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 60,000 and 70,000 cubic feet) shall be charged for at the rate of thirteen (13) cents per 100 cubic feet.

All water used in excess of 70,000 cubic feet per month to be charged for at the rate of twelve (12)

cents per 100 cubic feet.

No monthly meter bill to be less than one and 80-100 dollars (\$1.80), except as hereinafter provided.

Upon application of any ratepayer the Board of Supervisors shall reserve the right, upon a proper showing of cause, to require the company to put in a meter and charge meter rates for any consumer of water, on such conditions as the Board may impose, as to the rental when meter is not actually used.

Meter Rates for Shipping.

Water shall be furnished and delivered by meter measurement to shipping lying alongside of the bulk-head or any of the wharves on the water front where water pipes or mains are laid, between the hours of 6 o'clock a. m. and 6 o'clock p. m., daily, upon application being made therefor, at the following rates: When supplied by reel and hose cart, \$1.50 per 1000 gallons. When supplied by connection with water pipes, at rates that shall not exceed double the regular meter rates established by Section 10. The minimum charge for each separate delivery to be fifty (50) cents.

No water boat furnishing and supplying water to shipping lying at anchor within the limits of the wharves of the City and County of San Francisco shall charge a rate to exceed three dollars (\$3.00) per 1000 gallons.

Hydrant Rates.

Section 11. The rates of compensation to be collected for water supplied by and through hydrants to the City and County of San Francisco shall be two dollars and fifty cents (\$2.50) per month for each

hydrant for fire purposes and flushing of sewers.

Prevention of Waste.

Section 12. Prevention of waste or excessive use :

In no case where the fixed rates above provided other than meter rates, are applicable, shall any charge for water be made by meter rates, it being the purpose of this Ordinance to provide for all dwelling houses a fixed monthly rate which shall not be increased by the person, company or corporation supplying water.

Provided, however, that for the purpose of discovering and repressing waste or excessive use, all persons, companies or corporations shall have the right in all cases to apply and maintain meters to measure the water used or consumed, and to charge and collect for waste or excessive use under the condition and to the extent hereafter provided in this section, and not otherwise.

No consumer shall be deemed guilty of waste or excessive use unless the water used or consumed upon his premises in any month shall exceed by fifty (50) per cent the number of cubic feet which at regular meter rates amount to his rated bill, in which case such excess shall be deemed waste or excessive use.

Immediately after the discovery of any waste or excessive use, the consumer shall be notified thereof by the person, company or corporation supplying water by notice mailed to his address or to the agent or person to whom his water bills are presented for collection.

After such notice the consumer may be charged and there may be collected from him for any waste or

excessive use thereafter occurring upon his premises at regular meter rates, but such charge or collection shall not exceed for the first month the sum of two dollars (\$2.00), for the second month the sum of four dollars (\$4.00), or for any following month the sum of five dollars (\$5.00).

Board of Public Works to Examine Complaints, Etc.

It shall be the duty of the Board of Public Works, by its Gas, Water and Electrical Inspector of this City and County, to inquire into all cases of complaints by water consumers as to charges made against them for waste or excessive use under the foregoing provisions of this section, and to adjust such charge as follows:

Any water consumer against whom a water bill is presented containing a charge for waste or excessive use of water may within five days after such bill is presented to him (provided that he first pay the fixed rate charged on such bill, exclusive of the charge made for said alleged waste or excessive use) make complaint to said inspector that such charge is incorrect, whereupon the said inspector shall promptly inspect the premises of the consumer so complaining and cause a test to be made of the water meter upon said premises, and from such inspection and test and subsequent inspection and test as said inspector may see fit and proper to make shall determine as near as can be the amount of water used, consumed or wasted upon said premises during the period covered by said bill. As soon as such determination is made and within twenty (20) days after the said complaint is made said inspector shall make a certificate stating

the amount of water so determined to have been used, consumed or wasted, and showing the true and correct amount, if anything, which may be charged against and collected from said consumer under the foregoing provisions of this section for waste or excessive use, and shall immediately transmit such certificate to the person, company or corporation supplying water, and also a copy thereof by mail to the water consumer.

That said certificate shall be conclusive between the water consumer and said person, company or corporation as to the amount, if anything, which said person, company or corporation shall be entitled to collect from the consumer for waste or excessive use of water during the period covered by the bill of which complaint is made; provided, however, that if either the consumer or the water company is dissatisfied with the certificate of the water inspector appeal may be taken within five (5) days to the Committee on Water Rates of the Board of Supervisors, which shall, within five (5) days after such appeal, hear and finally determine the matter in dispute.

The said inspector shall keep in his office a proper record or records, showing the date of each complaint made to him, the name of the consumer complaining, the location of his premises, and stating briefly the inspection made by him of the premises and the tests applied to the meter, the time or times of such inspection and tests, and the results thereof, with the reading of the meter at each test or inspection, and all other material facts connected therewith. Such records so kept to be open for public examination in his office.

Rates—When Payable.

Section 13. All water rates, except meter rates and City and County rates, are due and payable monthly in advance.

Meter and City and County rates are due and payable at the end of each month, and upon meter rates a deposit not exceeding three-fourths ($\frac{3}{4}$) of the value of the estimated quantity of water to be consumed may be required.

Notice of Discontinuance.

Section 14. Any consumer may at any time, upon payment of accrued rates, notify the company in writing to cut off or discontinue the water supply upon his premises, after which no charge shall be made for water for said premises until the use of water is resumed.

Maximum Rates Fixed.

Section 15. This Ordinance fixes the maximum beyond which no person, company or corporation shall be permitted to charge for water supplied.

Section 16. This Ordinance shall take effect and be in force on and from July 1, 1912, to June 30, 1913.

Passed for printing—Board of Supervisors, San Francisco, June 17, 1912.

Ayes—Supervisors Bancroft, Caglieri, G. E. Gallagher, Giannini, Hayden, Hilmer, Hocks, Jennings, Koshland, Mauzy, McCarthy, McLeran, Murdock, Murphy, Payot, Vogelsang.

Noes—Supervisors A. J. Gallagher, Nolan.

[Endorsed]: Filed Jun. 26, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [82]

[Order to Show Cause and Restraining Order.]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, THE
BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRAN-
CISCO, IN THE STATE OF CALI-
FORNIA, and PAUL BANCROFT, GUIDO
E. CAGLIERI, ANDREW J. GALLA-
GHER, GEORGE E. GALLAGHER, A. H.
GIANNINI, J. EMMET HAYDEN, FRED
L. HILMER, OSCAR HOCKS, THOMAS
JENNINGS, ADOLF KOSHLAND, BY-
RON MAUZY, WILLIAM H. McCARTHY,
RALPH McLERAN, CHARLES A. MUR-
DOCK, DANIEL C. MURPHY, EDWARD
L. NOLAN, HENRY PAYOT and ALEX-
ANDER T. VOGELSANG, as Members of the
Board of Supervisors of the City and County
of San Francisco,

Defendants.

WHEREAS in the above-entitled action it has been made to appear by the bill of complaint now filed herein, and the exhibit annexed thereto, which said bill of complaint is verified, and the affidavits filed by complainant, that a proper case exists for this order:

NOW IT IS ORDERED that the defendants in the above-entitled cause be and appear before the District Court of the United States, for the Northern District of [83] California, Second Division, in the courtroom of said court, in the United States courthouse and Postoffice Building, at the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, at 10 o'clock A. M., on Monday, the 8th day of July, A. D. 1912, and then and there show cause, if any they have, why they, and each of them, and all consumers of water in said City and County of San Francisco, should not be enjoined and restrained, during the pendency of this action, and from and after the 30th day of June, 1912, and until the final determination of this cause, from bringing, or causing to be brought, any suit or suits, action or actions, against the complainant, in law or in equity, to enforce the purported bill or ordinance set forth as Exhibit "A" to said bill of complaint, and purporting to have been finally passed by said Board of Supervisors of the said City and County of San Francisco on the 24th day of June, 1912, or any suit or suits, action or actions, against the complainant for the forfeiture of complainant's franchise, works or property, or for any other purpose, on account of complainant's failure or refusal

to conform to the rates purported to be prescribed by said purported bill or ordinance, and from any attempt or suit or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or attempted to be enacted or established by said purported bill or ordinance, and from in anywise asserting or claiming that said purported ordinance is a valid and binding or enforceable ordinance, and that complainant is in anywise bound thereby, or compelled or required in anywise to observe the same, [84] or any of the provisions thereof, and why the said purported bill or ordinance and the enforcement thereof should not, in all respects, be suspended and enjoined, and why the defendants should not be enjoined and restrained from the commission of any of the acts complained of in said bill of complaint, and that, in the meantime and until the hearing and determination of this order to show cause, said defendants, and each and all of them, their servants, agents and employees, and all consumers of water in said City and County of San Francisco be enjoined and restrained from bringing, or causing to be brought, any suit or suits, action or actions, against the complainant, in law or in equity, to enforce said purported bill or ordinance, or any suit or suits, action or actions, against the complainant for the forfeiture of complainant's franchise or works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates purported to be prescribed by said purported bill or ordinance, and from any attempt, suit or action, directly or indirectly, to compel the com-

plainant to furnish water at the rates purported to be fixed or established by said purported ordinance, and from in anywise claiming or asserting or demanding that complainant is compelled or required to furnish water at the rates purported to be established by said purported ordinance, and from in anywise asserting or claiming that said purported ordinance is a valid or binding or enforceable ordinance, or that complainant is in anywise bound thereby or compelled or required in any wise to observe the same, or any of the provisions thereof, and that, pending the hearing and determination hereof, said purported ordinance [85] and the enforcement thereof be, in all respects, suspended and enjoined.

IT IS FURTHER ORDERED that complainant file a bond in the sum of One Hundred Thousand (\$100,000) Dollars, to be approved by the clerk of this court, which said bond shall be payable to the defendants and for the use and benefit of the defendants so far as their rights may be concerned, and for the use and benefit of each and every and all water consumers in said City and County of San Francisco and all persons who may be injured by said injunction. Said undertaking shall be conditioned that complainant will pay to the defendants or the consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain if, upon the entry of a final decree on the merits, it shall be determined that said injunction was improvidently issued. Said undertaking shall also be conditioned that complainant will abide by and perform each and all of the foregoing conditions pro-

vided in this order, and also that complainant will abide by and perform the judgment of the court on final decree, and in the event it is adjudged by this court that any charge or charges, or any portion of any charge or charges made by complainant for water during the time said injunction is in force are excessive, that such excess shall and may be returned to the person or persons from whom the same was collected. [86]

IT IS FURTHER ORDERED that a copy of this order, certified by the clerk under his hand and the seal of this court, be served on the defendant to be restrained hereby.

Dated this 26th day of June, 1912.

(Sgd.) WM. C. VAN FLEET,
Judge.

[Endorsed]:

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Restraining Order on the therein named City and County of San Francisco, a Municipal Corporation, by handing to and leaving a Certified copy thereof with James Rolph, Jr., the Mayor of the City and County of San Francisco, a Municipal Corporation, personally at Carmel-by-the-Sea, Monterey County in said District on the 29th day of June, A. D. 1912.

C. T. ELLIOTT,
U. S. Marshal.
By T. F. Kirman,
Office Deputy.

Filed June 26, 1912. Jas. P. Brown, Clerk. By
J. A. Schaertzer, Deputy Clerk. [87]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, THE
BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRAN-
CISCO, IN THE STATE OF CALI-
FORNIA, and PAUL BANCROFT, GUIDO
E. CAGLIERI, ANDREW J. GALLA-
GHER, GEORGE E. GALLAGHER, A. H.
GANNINI, J. EMMET HAYDEN, FRED L.
HILMER, OSCAR HOCKS, THOMAS
JENNINGS, ADOLF KOSHLAND, BY-
RON MAUZY, WILLIAM H. McCARTHY,
RALPH McLERAN, CHARLES A. MUR-
DOCK, DANIEL C. MURPHY, EDWARD
L. NOLAN, HENRY PAYOT and ALEX-
ANDER T. VOGELSANG, as Members of
the Board of Supervisors of the City and
County of San Francisco.

Defendants.

**Affidavit on Behalf of the Defendants in Opposition
to Motion for Preliminary Injunction.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Daniel C. Murphy, being first duly sworn, deposes and says: I am a member of the Board of Supervisors of the City and County of San Francisco, and as such, am one of the defendants in the above-entitled action. I am the Chairman of the Judiciary [88] Committee of said Board of Supervisors.

James Rolph, Jr., Mayor of said City and County of San Francisco, is at present temporarily absent from said city upon his vacation and for that reason I make this affidavit on behalf of said City and County of San Francisco and also on behalf of all the defendants in the above-entitled action.

The Constitution of the State of California, which went into effect in 1879 and has been in effect ever since said date and now is in full force and effect, provides for the fixing of water rates by the Boards of Supervisors of municipalities within said State in Article XIV, Section 1 thereof, which reads as follows:

“The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; *provided*, that the rates or compensation to be collected by any person, company,

or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and water-works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use."

Article XIV, Section 2 of said Constitution further provides as follows:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and cannot be exercised except by au-

thority of and in the manner prescribed by law.”

[89]

Said Constitution further provides, in Article I, Section 13 thereof, as follows:

“No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law.”

Said Constitution further provides, in Article I, Section 14 thereof, as follows:

“Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner.”

The Supreme Court of the State of California, which is the highest court in said State, in construing and interpreting the meaning of Article XIV, Section 1 of the said Constitution, in the case of *Water Works v. San Francisco*, which is reported in Vol. 82 of the official California Reports, at pages 305–306, has determined and limited the meaning of said section of said Constitution in the following language:

“The whole gist of the complaint is, that the board of supervisors have *not* exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the

water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the jurisdiction of the board." [90]

Said Supreme Court, in again defining the meaning of said Section 14, Article I of said Constitution, in the case of San Diego Water Company v. San Diego, which is reported in Vol. 118 of the official reports of said court, at page 566, used the following language:

"The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment

and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the supreme court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the constitution."

Said Supreme Court of the State of California in again interpreting the meaning of said Article XIV, section 1, in the case of *Contra Costa Water Company v. Oakland*, reported in Vol. 159 of the official reports of said court, at page 333, has adopted the language used by the Supreme Court of the United States in its interpretation of the aforesaid section of the State constitution in the following language:

"As is the case in regard to many other legislative acts, the legislative officers in determining what will be the proper rate of compensation are necessarily obliged to use some degree of judgment and discretion, and are 'bound in morals and in law to exercise an honest judgment as to all matters submitted to their official determina-

tion.' (Spring Valley Water Works v. Schotler, 110 U. S. 354, (4 Sup. Ct. 48, 28 L. ed. 173).''

Affiant further alleges that the above quoted interpretations of said Article XIV, Section 1 of the Constitution of the State of California are a final determination by the highest court [91] in the State of California of the meaning of the aforesaid section of the said State Constitution.

Affiant further alleges that he was present at all the sessions of the Board of Supervisors of the City and County of San Francisco and of the committees thereof at which the fixing of water rates for the fiscal year 1912-13 were considered by said Board. The Spring Valley Water Company, the complainant in the above-entitled action, had notice of all said meetings and prior to the said meetings and hearings said company filed with said Board of Supervisors its statements in writing showing the value of its properties as claimed by said complainant company and the rate of return to which said company alleged that it was entitled from the rates to be fixed for said fiscal year. Representatives of said complainant company attended the various meetings of said Board of Supervisors and its committees at which the fixing of said water rates was discussed, and considered and participated therein and said rates were fixed after a full and fair opportunity given to the representatives of said complainant company to make any and all showings which the officers of said company might desire, with regard to the sufficiency or adequacy of said rates.

Affiant further alleges that the alleged cause of ac-

tion set forth in the bill of complaint in the above-entitled action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the above-entitled court; and for that reason the said court has no jurisdiction of the alleged cause of action set forth in said bill of complaint.

Affiant further prays, on behalf of all the defendants in the above-entitled action that the prayer of complainant for the issuance of a writ of temporary injunction in the above-entitled action be denied and that said bill of complaint be ordered [92] dismissed for want of jurisdiction in said above-entitled court.

DANIEL C. MURPHY.

Subscribed and sworn to before me this 12th day of July, 1912.

H. I. PORTER,

Deputy County Clerk in and for the City and County of San Francisco, State of California.

Service by copy of within original is hereby admitted this 13th day of July, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Solicitors for Complainant.

[Endorsed]: Filed July 15, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corpo-
ration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, THE BOARD OF
SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO, IN THE
STATE OF CALIFORNIA, and PAUL BAN-
CROFT, GUIDO E. CAGLIERI, ANDREW
J. GALLAGHER, GEORGE E. GALLA-
GHER, A. H. GIANNINI, J. EMMET HAY-
DEN, FRED L. HILMER, OSCAR HOCKS,
THOMAS JENNINGS, ADOLF KOSH-
LAND, BYRON MAUZY, WILLIAM H. Mc-
CARTHY, RALPH McLERAN, CHARLES
A. MURDOCK, DANIEL C. MURPHY, ED-
WARD L. NOLAN, HENRY PAYOT and
ALEXANDER T. VOGELSANG, as Mem-
bers of the Board of Supervisors of the City
and County of San Francisco,

Defendants.

Order of Injunction.

The above-entitled action having come on duly for
hearing before this Court, and arguments having
been heard, and the Court having considered the
same, and it appearing to the Court that an injunc-
tion, as hereinafter provided, should issue,

NOW, THEREFORE, IT IS HEREBY ORDERED that an interlocutory injunction issue in the above-entitled [94] action, enjoining and restraining defendants, and each of them, and all consumers of water in the City and County of San Francisco, during the pendency of this action and until the final determination thereof, from bringing or causing to be brought, any suit or suits, action or actions, against complainant, in law or in equity, to enforce the bill or ordinance set forth as Exhibit "A" to said bill of complaint and finally passed by said Board of Supervisors of the City and County of San Francisco, on the 24th day of June, 1912, or any suit or suits, action or actions, against complainant for the forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance and from any attempt, or suit, or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or enacted, or established by said bill or ordinance, and from in anywise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is in any wise bound thereby or compelled or required, in anywise, to observe the same, or any of the provisions thereof.

AND IT IS FURTHER ORDERED that, pending the hearing and final determination of the above-entitled action, said ordinance and the enforcement thereof be in all respects suspended and enjoined.

AND IT IS FURTHER ORDERED that com-

plainant file a bond in the sum of Fifty Thousand (50,000) Dollars, to be [95] approved by the Clerk of this court, which said bond shall be payable to the defendants and for the use and benefit of defendants so far as their rights may be concerned, and for the use and benefit of each and every and all water consumers in said City and County of San Francisco, and all persons who may be injured by said injunction. Said undertaking shall be conditioned that complainant will pay to the defendants, or the consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain, if, upon the entry of a final decree upon the merits, it shall be determined that said injunction was improvidently issued. Said undertaking shall also be conditioned that complainant will abide by and perform each and all of the foregoing conditions provided in this order and also that complainant will abide by and perform the judgment of the Court on final decree and, in the event it is adjudged by this Court that any charge or charges, or any portion of any charge or charges, made by complainant for water during the time said injunction is in force, are excessive, that such excess shall and may be returned to the person or persons from whom the same was collected.

IT IS FURTHER ORDERED, pursuant to stipulation of the parties hereto, on file herein, that all amounts collected by complainant, in the above-entitled action, in excess [96] of the rates fixed by ordinance for the fiscal year beginning July 1, 1912,

be deposited and impounded each month with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in said action, and that within fifteen (15) days after each monthly deposit complainant file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during said calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in said bank during said month. The amounts so deposited shall be withdrawn only on checks drawn by a special master and countersigned by a Federal Judge, sitting in this court.

In order to facilitate the return of moneys so deposited, in the event of a decision or order of this Court directing such return, J. A. Schaertzer, Deputy Clerk of this court, is hereby appointed a special master to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court.

IT IS FURTHER ORDERED that a copy of this order, certified by the clerk under his hand and the seal of this court, be served on defendants enjoined and restrained hereby.

Dated: San Francisco, California, July 20, A. D. 1912.

WM. C. VAN FLEET,
Judge. [97]

[Endorsed]: Filed July 20, 1912.

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [98]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, THE BOARD OF
SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO, IN THE
STATE OF CALIFORNIA, and PAUL BAN-
CROFT, GUIDO E. CAGLIERI, ANDREW
J. GALLAGHER, GEORGE E. GALLA-
GHER, A. H. GIANNINI, J. EMMET HAY-
DEN, FRED L. HILMER, OSCAR HOCKS,
THOMAS JENNINGS, ADOLF KOSH-

LAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Writ of Injunction.

The President of the United States of America, to The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, Defendants, Greeting: [99]

WHEREAS, after full hearing and consideration of the application of complainant in the above-entitled cause for a preliminary injunction, the District Court of the United States, Northern District of California, Second Division, did, by its order duly made and entered on the 20th day of July, 1912, direct that a preliminary injunction issue herein restraining and enjoining you and each of you from doing certain of the acts and things complained of

in the said complainant's bill of complaint herein, and hereinafter more particularly set forth; and,

WHEREAS, said Court directed said complainant to file in said cause an undertaking in the sum of Fifty Thousand (50,000) Dollars, conditioned that complainant will pay to defendants or to consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain if, upon the entry of a final decree on the merits, it shall be determined that said injunction was improvidently issued and that said complainant will abide by and perform each and all of the conditions of the order upon which said injunction was issued, and will abide by and perform the judgment of the Court on final decree, and, in the event it is adjudged by the Court that any charge or charges, or any portion of any charge or charges, made by complainant for water during the time this injunction is in force, are excessive, that such excess shall be and may be returned to the person or persons from whom the same was collected; and said undertaking having been duly approved and filed as directed: [100]

NOW, THEREFORE, in consideration of the premises, we do hereby strictly command and enjoin you, the said City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar

Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, and all consumers of water from the complainant herein, and all consumers of water in the City and County of San Francisco, and each of you, that you do forthwith, and until the final determination of this action, desist and refrain from bringing or causing to be brought any suit or suits, action or actions, against complainant, hereinbefore named at law or in equity, to enforce the bill or ordinance set forth as Exhibit "A" to complainant's said bill of complaint, and finally passed by said Board of Supervisors of the City and County of San Francisco on the 24th day of June, 1912, and from bringing or causing to be brought any suit or suits, action or actions, against complainant for the forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance, and from any attempt or suit or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and [101] set forth or enacted or established by said bill or ordinance, and from in anywise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is in anywise thereby bound or compelled or required in anywise to observe the same or any of the provisions thereof.

And the foregoing we do strictly command and enjoin upon you under the penalty of the law in such case made and provided.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of July, in the year of our Lord one thousand nine hundred and twelve and of our Independence the one hundred and thirty-seventh.

[Seal]

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I have served the annexed Writ of Injunction on the therein named City and County of San Francisco, a Municipal Corporation, et al., by handing to and leaving a true copy and correct thereof with James Rolph, Jr., Mayor of the City and County of San Francisco, a Municipal Corporation, personally at San Francisco in said District on the 23d day of July, 1912. * * *

C. T. ELLIOTT,
U. S. Marshal.

By Paul J. Arnerich,
Deputy. [102]

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I have served the

annexed Writ of Injunction on Thos. E. Haven, an Assistant City Attorney in and for the City and County of San Francisco, by handing to and leaving a true and correct copy thereof with Thos. E. Haven as such Assistant U. S. Attorney, personally, at San Francisco, in said District on the 23d day of July, 1912. * * *

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Deputy.

[Endorsed]: Filed July 26, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,
Defendants.

**Petition for Allowance of Appeal from Order for
Issuance of Interlocutory Injunction.**

The City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, An-

drew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, defendants in the above-entitled suit, each conceiving itself or himself aggrieved by the order made and entered in the above-entitled cause in said court under date of July 20, 1912, wherein and whereby [104] each of said defendants, and all consumers of water in the City and County of San Francisco, were enjoined and restrained, during the pendency of said action, and until the final determination thereof, from bringing, or causing to be brought, any suit or suits, action or actions, against complainant, in law or in equity, to enforce the bill or ordinance set forth in complainant's bill of complaint in said action; or any suit or suits, action or actions, against complainant for forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance, and from any attempt, or suit, or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or enacted, or established, by said bill or ordinance, and from in any wise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is bound thereby, or compelled or required to observe the same,

or any of the provisions thereof, and further suspending and enjoining the enforcement of said ordinance pending the hearing and final determination of the said above-entitled action, do, and each of them doth, hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their petition for said appeal, may be allowed, and that a transcript of the papers and records upon which said order was made be sent to the United States Circuit Court of Appeals, [105] for the Ninth Circuit, duly authenticated.

Dated: July 24th, 1912.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGEL-SANG, as Members of the Board of

vs. Spring Valley Water Company. 117

Supervisors of the City and County of
San Francisco.

By PERCY V. LONG,
City Attorney.

THOS. E. HAVEN,
Assistant City Attorney,
Attorneys for Said Defendants. [106]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Defendants.

Assignment of Errors.

The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, defendants in the above-en-

titled suit, jointly and severally, assign the following assignment of errors, upon which they, and each of them, will rely upon their prosecution of an appeal in said suit, petition for which they file at the same time with this assignment: [107]

First: That the said District Court of the United States has no jurisdiction of the above-entitled action, and was at the time of the entry of the said order appealed from, and is, without jurisdiction to enter such order or to grant the injunction prayed for, in that the alleged cause of action set forth in the bill of complaint in the above-entitled action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said District Court of the United States.

Second: That the said District Court of the United States has no jurisdiction of the above-entitled action, and was at the time of the entry of the said order appealed from, and is, without jurisdiction to enter such order or to grant the injunction prayed for, for the reason that the acts of the Board of Supervisors of the City and County of San Francisco, in passing the ordinance complained of, as set forth in the bill of complaint in said action, were not action by the State of California, and therefore were not State action within the purview of the provisions of the Constitution of the United States.

Third: That the said District Court of the United States erred in entering the order appealed from for the reason that it appears from complainant's showing made upon the hearing of its petition for said order, that the said complainant is not entitled to the

relief [108] prayed for against the defendants, or any of them.

Dated: July 24th, 1912.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGEL-SANG, as Members of the Board of Supervisors of the City and County of San Francisco.

By PERCY V. LONG,
City Attorney.

THOS. E. HAVEN,
Assistant City Attorney,
Attorneys for Said Defendants. [109]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,
Defendants.

Order Granting Defendants' Petition on Appeal.

The foregoing petition on appeal is hereby granted, and the claim of appeal therein made is allowed, upon the said defendants filing with the clerk of this court a good and sufficient bond, to be approved by the court, in the sum of Three Hundred (300) Dollars, to the effect that said defendants will prosecute said appeal to effect and answer all costs and damages in case they fail to make such appeal good, then said obligation to be void, otherwise it shall remain in full force and effect; said bond not to operate as a supersedeas bond.

Dated July 24th, 1912.

WM. C. VAN FLEET,
Judge of the United States District Court for the
Northern District of California. [110]

Service of the within petition for allowance of appeal, assignment of errors and order granting defendants' petition on appeal and receipt of copies of all

thereof is hereby admitted this 24th day of July, 1912.

EDW'D. J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Complainant.

[Endorsed]: Petition for Allowance of Appeal,
Assignment of Errors and Order Granting Appeal.
Filed July 24, 1912. Jas. P. Brown, Clerk. By
J. A. Schaertzer, Deputy Clerk. [111]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, The City and County of San Francisco, a
municipal corporation, The Board of Supervisors
of the City and County of San Francisco, in the
State of California, and Paul Bancroft, Guido E.
Caglieri, Andrew J. Gallagher, George E. Gallagher,
A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer,
Oscar Hocks, Thomas Jennings, Adolf Koshland,

Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, as principals, and Massachusetts Bonding and Insurance Company, a corporation duly incorporated under the laws of the State of Massachusetts, with an office at the City and County of San Francisco, in the Northern District of [112] California, and authorized by the laws of the United States to become surety upon bonds of this character, as surety, are held and firmly bound unto complainant in the above-entitled cause in the full and just sum of Three Hundred (300) Dollars, to be paid to said complainant and its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our executors, representatives and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of July, A. D. 1912.

WHEREAS, lately at a session of the District Court of the United States, for the Northern District of California, Second Division, in a suit pending in said court between the above-named complainant and the above-named defendants, the said defendants having obtained from said court an order allowing their appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the injunctive order entered in said cause on July 20, 1912, and a citation to said complainant is about to be issued, citing and admonishing it to be and ap-

pear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in San Francisco:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said defendant shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, then the above obligation is to be void; otherwise it [113] is to remain in full force and effect.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board

of Supervisors of the City and County of
San Francisco,

By PERCY V. LONG,

City Attorney,

THOS. E. HAVEN,

Assistant City Attorney,

Attorneys for Defendants.

**MASSACHUSETTS BONDING AND
INSURANCE COMPANY.**

[Seal]

By FRANK M. HALL,

By S. M. PALMER,

Attorneys in Fact. [114]

**Affidavit, Acknowledgment and Justification of
Guarantee of Surety Company.**

On this 24th day of July, 1912, before me personally came Frank M. Hall, known to me to be the Attorney in Fact, of MASSACHUSETTS BONDING AND INSURANCE COMPANY, the corporation described in and which executed the within and foregoing bond of The City and County of San Francisco et al., as the surety thereon; and who, being by me duly sworn, did depose and say: That he resides in San Francisco, State of California; that he is the attorney in fact of said Company, and knows the corporate seal thereof; that said MASSACHUSETTS BONDING AND INSURANCE COMPANY is duly and legally incorporated under the laws of the State of MASSACHUSETTS; that said Company has complied with the provisions of the Act of Congress of August 13, 1894; that the seal affixed to the within bond of the City and County of San Francisco et al., is the corporate seal of said Company, and is thereto

affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such officer of said Company, and that he is acquainted with S. M. Palmer, and knows her to be the attorney in fact of said Company, and that the signature of said S. M. Palmer is subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, [115] exceed its debts and liabilities of every nature by more than the sum of six hundred (600) dollars; that BOSTON is the home of said corporation, and said corporation has designated John H. Robertson, whose office address is First National Bk. Bldg., San Francisco, as its agent to accept service on its behalf within the Ninth Judicial District of the State of California, wherein this bond is given.

FRANK M. HALL.

Sworn to, acknowledged before me, and subscribed in my presence, this 24th day of July, 1912.

[Seal]

NETTIE HAMILTON,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires March 24th, 1913.

APPROVAL BY COURT.

The sufficiency of surety on within bond and said bond are hereby approved this 25th day of July, 1912,

as a cost bond on appeal, but not as a supersedeas bond on appeal.

WM. C. VAN FLEET,
Judge of the District Court of the United States,
Northern District of California.

[Endorsed]: Filed Jul. 25, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corpo-
ration,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, THE BOARD OF
SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO, IN THE
STATE OF CALIFORNIA, and PAUL BAN-
CROFT, GUIDO E. CAGLIERI, ANDREW
J. GALLAGHER, GEORGE E. GALLA-
GHER, A. H. GIANNINI, J. EMMET HAY-
DEN, FRED L. HILMER, OSCAR HOCKS,
THOMAS JENNINGS, ADOLPH KOSH-
LAND, BYRON MAUZY, WILLIAM H. Mc-
CARTHY, RALPH McLERAN, CHARLES
A. MURDOCK, DANIEL C. MURPHY, ED-
WARD L. NOLAN, HENRY PAYOT and

ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action as follows:

FIRST: The sole question which will be presented by appellants upon their appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order made by the above-entitled court on July 20, 1912, granting an interlocutory injunction in said action, will be the question of the alleged [117] want of jurisdiction of the District Court of the United States of the cause of action set forth in the bill of complaint in said action, and the alleged want of jurisdiction of said District Court to make the aforesaid order.

SECOND: It is further stipulated that for the purposes of this appeal the order appealed from was properly made if the court below had jurisdiction of the subject matter.

THIRD: In order that the record on appeal may not be encumbered by voluminous affidavits, which are not material to the determination of the said question of jurisdiction, it is further stipulated that all affidavits filed by complainant at the time of filing its complaint may be omitted from said record on appeal, and that such record may be made up by the clerk of the above-entitled court to consist of the following documents, to wit:

1. Bill of complaint filed by complainant in said action.

2. Order to show cause and restraining order.

3. Affidavit of Daniel C. Murphy, one of the defendants in said action, filed by the defendants upon the hearing of the motion for said interlocutory injunction.

4. Papers filed by defendants in the prosecution of their appeal, together with citation on appeal, and this stipulation.

5. Order granting interlocutory injunction and writ of injunction.

FOURTH: The clerk of the above-entitled court is hereby authorized and empowered to make up said record on appeal as hereinabove set forth, and to omit therefrom all affidavits filed by complainant at the time of the filing of its bill of complaint herein.
[118]

FIFTH: It is further stipulated that said appeal may be heard by said United States Circuit Court of Appeals, for the Ninth Circuit, upon the record which will be made up by the Clerk of the above-entitled court, in accordance with the terms of the foregoing stipulation.

Dated: July 31st, 1912.

EDWARD J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT &
OLNEY,

Attorneys for Complainant.

PERCY V. LONG,
THOS. E. HAVEN,

Attorneys for Defendants.

[Endorsed]: Filed August 12, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [119]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,569.

SPRING VALLEY WATER COMPANY,
Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Clerk's Certificate to Transcript of Record.

I, Jas. P. Brown, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing one hundred and nineteen (119), pages numbered from 1 to 119, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled suit, as called for by the stipulation herein, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record on appeal is \$74.90; and that said amount was paid by the defendants; and that the original citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of August, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court, Northern
District of California.

By W. B. Maling,
Deputy Clerk of said District Court. [120]

[Citation.]

UNITED STATES OF AMERICA,—ss.
The President of the United States, to Spring Valley
Water Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 24th day of August, 1912, being within thirty days from the date hereof, pursuant to an Order Allowing Appeal filed in the Clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein the City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolph Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board

of Supervisors of the City and County of San Francisco, are appellants and you are appellee to show cause, if any there be, why the order granting an injunction filed and rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 25th day of July, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this 26th day of July, A. D. 1912.

EDW'D. J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT &
OLNEY,

Attorneys for Complainant.

[Endorsed]: Original. No. 15,569. In the District Court of the United States for the Ninth Circuit, Northern District of California, Second Division. Spring Valley Water Company vs. City and County of San Francisco et al. Citation. Filed July 26th, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

[Endorsed]: No. 2176. United States Circuit Court of Appeals for the Ninth Circuit. The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolph Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, Appellants, vs. Spring Valley Water Company, a Corporation, Appellee. Transcript of Record upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed August 26, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

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No. 2176.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, the BOARD OF SUPER-
VISORS OF THE CITY AND COUNTY OF SAN
FRANCISCO, IN THE STATE OF CALIFOR-
NIA, and PAUL BANCROFT, GUIDO E. CAG-
LIERI, ANDREW J. GALLAGHER, GEORGE
E. GALLAGHER, A. H. GIANNINI, J. EMMET
HAYDEN, FRED L. HILMER, OSCAR HOCKS,
THOMAS JENNINGS, ADOLPH KOSHLAND,
BYRON MAUZY, WILLIAM H. McCARTHY,
RALPH McLERAN, CHARLES A. MURDOCK,
DANIEL C. MURPHY, EDWARD L. NOLAN,
HENRY PAYOT and ALEXANDER T. VOGEL-
SANG, as Members of the Board of Supervisors of
the City and County of San Francisco,

Appellants,

vs.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from an order of the District Court for the Northern District of California, Second Division, granting a temporary injunction enjoining and restraining defendants, and each of them, and all con-

sumers of water in the City and County of San Francisco from attempting to enforce the provisions of an ordinance adopted by the Board of Supervisors of the City and County of San Francisco fixing water rates for the fiscal year extending from July 1, 1912, to June 31, 1913. The order of injunction and the writ of injunction appear in the record on pages 105 to 114.

The application for the injunction was based upon the Bill of Complaint and certain affidavits filed by complainants. The sole question involved upon this appeal is as to the jurisdiction of the District Court to entertain the action or to grant the injunction. For that reason the record in this Court has been shortened under stipulation of counsel by the omission of the affidavits filed by plaintiff which do not bear upon the question of jurisdiction. The question arising upon this appeal is presented by the allegations contained in the Bill of Complaint, and in an affidavit filed by defendants.

The action was brought to restrain the enforcement of the ordinance fixing water rates above referred to. The authority for fixing such rates is found in Article XIV, Section 1, of the California Constitution, which is set forth in full in defendants' affidavit. (Record, pp. 98-99.)

The cause of complaint as set forth in the Bill is that the rates fixed by the ordinance are unjust, unreasonable and confiscatory in that they do not provide a sufficient income for the complainant; and further that the said ordinance was passed without consideration of the value of complainant's properties and with the ulterior motive of depreciating the value of complain-

ant's property. The objection of complainants to the rates fixed by the ordinance is further shown by the following references to and quotations from its Bill of Complaint.

It is alleged that complainant "is fairly entitled to
 " have and receive, as rates for water supplied by it to
 " said City and County of San Francisco, and its in-
 " habitants, an income which will realize at least seven
 " per cent upon the actual value of the actual property
 " in use in furnishing and supplying said water, and,
 " in addition thereto, its actual operating expenses and
 " the amount of taxes levied for state and city and
 " county and county and other purposes," and a sum for
 depreciation and replenishment of its plant. (Com-
 plaint, par. V, Record, p. 37, fol. 35.)

It is further alleged as follows:

"That said bill or ordinance is, and the rates pur-
 ported to be fixed thereby are, wholly void, null,
 unjust, unreasonable, fraudulent and unconstitu-
 tional under the said provisions of the Constitution
 of the United States, and oppressive and confisca-
 tory and ambiguous, uncertain and unintelligible
 and that the said rates do not permit of, or provide
 for, a just or reasonable compensation for water to
 be supplied during said year by your orator, or
 any other person, to said City and County and its
 inhabitants, and that if said bill or ordinance is en-
 forced your orator's gross income for said fiscal
 year, after deducting operating expenses and taxes,
 a proper charge for depreciation and obsolescence,
 and a proper charge for replacement of portions of
 your orator's plant which may be destroyed by ex-
 traordinary casualty, will be insufficient to pay any

dividend whatever during said fiscal year to the stockholders of your orator in excess of two per cent upon the value of the property of your orator necessary to be used in supplying water to said City and County and its inhabitants." (Complaint, par. XIX, Record, p. 53.)

And again in paragraph XVI, Record, page 46, it is alleged:

"That this action is a case in equity arising, and that it arises, under the Constitution of the United States, and that the judicial power of the Honorable Court, above-entitled extends to and embraces this action and its issues, as your orator is informed and believes, and that the issues herein and in this action set forth involve federal questions under said Constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel your orator to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the said provisions of said Constitution of the United States, and by reason of and under said provisions are void and null; and that under said ordinance your orator would, and will, be compelled to furnish water to said city and county."

The cause of complaint against the rates is further

shown by the following quotations from the Bill of Complaint:

“That the rates fixed by the said bill or ordinance were fixed arbitrarily and at random and by mere guesswork, and were not based upon actual values of the properties, but upon the mere whim of the said Board of Supervisors, defendants herein, and that said Board never did determine or pretend to determine the value of the property of your orator then actually in use or to be used in supplying water for said fiscal year; and that various members of said Board of Supervisors, at the very meeting at which the said ordinance was to be passed, so stated. That said rates were fixed by the said Board without any consideration of, or regard to, the rights of your orator, or to the reasonable income and revenue to which your orator is entitled, based upon the value of the works actually used by your orator in supplying water to said city and county and its inhabitants, or to a reasonable income or revenue based upon the actual value of the actual property then in use, or used and owned, by your orator in supplying water to said city and county and its inhabitants, and without regard to the amount of said interest-bearing indebtedness or bonds of your orator assumed and owned by your orator or issued by it, or the annual interest thereon, or the actual operating expenses of your orator, or the actual amount of taxes which it will be required to pay, or the right of your orator’s stockholders to a reasonable or any dividend upon their said stock, and without any allowance for depreciation of your orator’s plant, or for obsolescence, and without any allowance to provide for the replacement of portions of the plant of your orator destroyed by extraordinary

casualties, but in total disregard thereof, and without reference to the value of the services in the premises to be rendered by your orator, or any other person or corporation, and without taking into account at all the value of the franchise, or the going and established business, of your orator." (Complaint, par. XVIII, Record, pp. 50-51.)

"And your orator further alleges that the said defendant, the Board of Supervisors, in making said rates for the fiscal year 1912-13 did the same with the purpose, as your orator verily believes, by means of said ordinance so passed in June, 1912, of depreciating the value of the property of your orator, and of crippling it in its financial condition so that the defendant, the City and County of San Francisco, could buy the property of your orator at far less than its actual and reasonable value. That said defendants have repeatedly stated that the interests of the City and County of San Francisco, and its inhabitants, demand and require the acquisition by said City and County of San Francisco of the property of your orator, used in supplying water to the City and County of San Francisco, and its inhabitants; that, as your orator is informed and believes, the said defendants, members of the Board of Supervisors of the City and County of San Francisco, recognize and admit that the rates fixed by said ordinance, Exhibit 'A', are inadequate to the service which will be rendered by your orator and are unfair to your orator, and said defendants were actuated to pass, and did pass, said ordinance for the purpose of discouraging your orator from continuing in the ownership and administration of said property, and because of the fear expressed by many of said defendant supervisors that the fixing or establishing of higher

rates than those to be fixed and established by said ordinance would embarrass and be detrimental to the said City and County of San Francisco in litigation pending between your orator and said City and County of San Francisco, in which is involved the validity of other rate ordinances passed by the Board of Supervisors of said City and County of San Francisco, and would embarrass and be detrimental to the said City and County in conducting negotiations for the purchase of the properties of your orator." (Complaint, par. XXII, Record, pp. 57-58.)

QUESTION INVOLVED.

The sole question involved in this appeal is: Have the Federal Courts jurisdiction of an action brought by a citizen of California against the Board of Supervisors of the City and County of San Francisco to enjoin the enforcement of a municipal ordinance fixing water rates, which rates are alleged in the Bill of Complaint to be unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible, and which ordinance is further alleged to have been adopted by said Board of Supervisors arbitrarily and by mere guess work and for a fraudulent purpose and with an ulterior motive?

ASSIGNMENT OF ERRORS.

The assignment of errors are: First, that the District Court of the United States had no jurisdiction of the action, and, second, that the District Court of the United States had no jurisdiction to grant the injunction.

Record, p. 118.

ARGUMENT.

SYNOPSIS.

1. The inhibitions of the fourteenth amendment to the United States Constitution are against acts by the states; and no alleged infringement of any of the rights protected by said amendment confers jurisdiction upon the federal courts unless the action complained of is an act by the state itself.

2. An act by state or municipal officers which is contrary to the express prohibitions of a statute of the state cannot be said to be the act of the state.

3. "When it comes to the question whether the ordinance of a municipality is or it not legislation by the state, there can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance." (Quoted from the decision of this Court in *City and County of San Francisco vs. United Railroads of San Francisco*, 190 Fed. 511.)

4. The power to fix water rates conferred upon municipal authorities by the Constitution of California (Art. XIV, Sec. 1) has been defined by the Supreme Court of California to be limited to the power to fix *reasonable* rates which will provide *just compensation*. Said Court has also determined that the fixing of any other rates is *beyond the power* of the municipal authorities.

5. The construction placed upon the provisions of

the California Constitution by the highest Court of the state will be followed by this Court.

6. The water rates complained of in this action are alleged in the Bill of Complaint to be "unreasonable, " unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible." (Record, p. 46.) The Bill of Complaint further alleges that said rates " were " fixed arbitrarily and at random and by mere guesswork," and that the Board of Supervisors did not base such rates upon the value of complainant's property as they are required to do under the law. (Record, p. 50.) And further that said rates were fixed by the Board of Supervisors for the fraudulent purpose of depreciating the value of complainant's property. (Record, pp. 57-58.)

7. The fixing of such rates as are above alleged is a plain violation of a duty placed upon municipal officers by the Constitution of the State. It is both beyond the power of the Supervisors and contrary to the express terms of the State Constitution, as interpreted by the Supreme Court of the State. Such acts cannot be attributed to the State; and hence they do not constitute "State action."

DISCUSSION AND AUTHORITIES.

I.

The inhibitions of the fourteenth amendment to United States Constitution apply to state action only.

Seattle Elec. Co. vs. Seattle R. S. Ry. Co., 185 Fed. 370;

City of Louisville vs. Cumberland T. & T. Co.,
 155 Fed. 729;
S. F. Gas & Electric Co. vs. San Francisco, 189
 Fed. 944;
City and County of S. F. vs. United Railroads,
 190 Fed. 509;
Memphis vs. Cumberland Tel. Co., 218 U. S.
 624, 54 L. Ed. 1185;
Barney vs. City of New York, 193 U. S. 430,
 48 L. Ed. 737.

II.

An act by municipal officers which is prohibited by a state statute does not constitute state action.

This is sustained by the same authorities as above cited under the first paragraph and by the authorities cited in those cases.

III.

In the determination of the question of whether or not a municipal ordinance is legislation by the state there can be no difference between a prohibited act and an act which is beyond the power of the municipality. The fixing of unreasonable or unjust rates is an ultra vires act of the municipality.

We apprehend that there will be no controversy in this case as to the correctness of the first two propositions above asserted. The law as to both of the matters therein set forth is settled in this circuit by the recent decisions of this Court above referred to. The District Court held that the facts in the case at bar differentiates it from the *Seattle and United Railroads*

cases, and that therefore a different rule should be applied. On the other hand, it was held by Judge Welborn in the Southern District of this State on February 13th of this year, that the rule announced by this Court in the two cases above referred to applied with equal force to a rate case similar to the case at bar. (*Home T. & T. Co. vs. Los Angeles.*) As this decision of Judge Welborn does not appear to have been reported, we annex a copy thereof to this brief as an appendix.

The argument of this brief will be directed toward attempting to prove that there is no difference in principle between a rate case and the two cases which have already been decided by this Court. In order to do this it is necessary to establish nothing more than that:

1. The fixing of unjust and confiscatory rates is an *ultra vires* act of a California municipality; and
2. That the same rule applies to an unauthorized act as to one which is prohibited by State statute.

In the United Railroads case this Court said:

“A state may act through a municipal corporation to which it has delegated powers of legislation, but where the ordinance of such a corporation is relied upon as constituting the impairment, it must be shown to have been enacted pursuant to the legislative authority of the state. Otherwise it is not state action.” (190 Fed. 510.)

What is the nature of the legislative authority conferred upon the City and County of San Francisco by Article XIV, Section 1, of the California Constitution? The Supreme Court of the State has declared that this power is limited to the power to fix *reasonable and just* rates, in the following cases:

Spring Valley W. W. vs. San Francisco, 82 Cal. 306;

San Diego Water Co. vs. San Diego, 118 Cal. 566.

In the first case it is said:

"The whole gist of the complaint is, that the board of supervisors have *not* exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardised should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the

jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty." (Italics by the Court.)

And in the second case it is further said:

"The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and *go beyond the powers conferred upon them*. Such was the conclusion reached by this court in *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the supreme court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the constitution.

"According to this construction, the rules announced under the first head of this opinion are applicable. If the council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, *it has so far exceeded the powers conferred upon it*, and the court is competent to afford redress." (Italics ours.)

In both of the above cases the point of controversy

was as to whether the courts of the State were authorized to afford relief against unjust and unreasonable rates. The contention of the municipal authorities was that the power to fix rates conferred by the State Constitution was absolute over which the Courts had no control. The Court held, however, that the Courts of the State could set aside unreasonable or unjust rates because their unreasonableness was an evidence that the fixing of the same was unauthorized—beyond the power which the State had conferred upon the municipality.

It is submitted that this principle and these authorities are conclusive of the question involved on this appeal. It must be conceded that the power exercised by a municipality in fixing rates is a power delegated by the State. In other words the city acts as the agent of the State in performing this governmental function. The Supreme Court has succinctly stated the limits of an agent's powers thus:

“The liability of the principal depends upon the fact; 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated.” (*Mechanics Bank of Alexandria vs. Bank of Columbia*, 18 U. S. [5 Wheat.] 326-327, 5 L. Ed. 100-104.)

The exception to the above rule which is applied in favor of persons dealing with an ostensible agent, of the limitations of whose powers they have no knowledge, cannot be applied in the case of a municipality as an agent. The powers of such municipality are fixed by the Constitution and are known to every one.

There can, therefore, be no ostensible power exercised by a municipality beyond that conferred.

Much of the confusion which has arisen in considering the power of municipalities in fixing rates is due to a failure to recognize that the act of such municipal agent for the State must be performed "within the limits of the powers delegated," as well as "in the exercise" of that power. Some of the cases seem to assume that because a municipality acts in the exercise of the delegated power, its act, whether just or unjust, must necessarily be within the limits of such power.

In the first California case above referred to the Court, after referring to the fact that the water controlled by the plaintiff and the right to dispose of the same "is property which cannot be taken without just compensation," proceeds:

"The fact that the right to store and dispose of the water is a public use, subject to the control of the state, and that its regulation is provided for by the constitution of this state, does not affect the question. Regulation, as provided for in the constitution, does not mean confiscation. If it does, then our constitution is clearly in violation of the constitution of the United States, which provides that this shall not be done." (82 Cal. 307.)

The reason why "regulation as provided for in the Constitution does not mean confiscation" is that property "cannot be taken without just compensation." Although the opinion of the Court does not in terms refer to Article I, Sections 13 and 14, of the California Constitution, it is clear that the guaranties of those

sections form the basis of the rule announced. Said sections provide:

"No person shall * * * be deprived of life, liberty or property without due process of law."

"Private property shall not be taken or damaged for public use without just compensation having first been made."

These sections are a part of the same instrument by which the power to regulate rates is delegated. It is elementary that all sections of the Constitution must be read together. When one section confers a power and another limits the exercise of the power how can it be said that the power has been delegated to be exercised freed from the limitation? As pointed out in the last quotation from the California case, if the State Constitution meant that the power existed in a municipality to confiscate property such a provision would constitute a plain violation of the Federal Constitution. The converse is equally true, viz.: a power of regulation which is so limited by the instrument by which it is conferred that it cannot be exercised unjustly or unreasonably without exceeding its limits does not conflict with such Constitution. The question at issue is not the *manner of the exercise* of a delegated power, but is the *extent of the power delegated*. In order to sustain the power of California municipalities to fix unreasonable or unjust rates, both the foregoing definitions of the nature of the power delegated, and the express limitations of the State Constitution itself must be disregarded.

It is noticeable in this connection that complainant has pleaded all the facts as to the method of fixing rates in the case at bar which the California Supreme Court has said show an attempted *ultra vires* act by the municipality. Not only are the rates alleged to be unreasonable and unjust, but it is also alleged that the rate fixing body refused to consider the value of complainant's properties, and so stated; that the rates were fixed "arbitrarily and at random and by mere "guesswork, and were not based upon actual values of "the properties, but upon mere whim of the said "Board of Supervisors"; and that they were fixed for the ulterior and fraudulent purpose of depreciating the value of complainant's properties. (See Statement of Facts.) If the Board of Supervisors has thus violated every rule and disregarded every limitation prescribed in the grant of its power to fix rates, how can such acts be imputed to the State, the grantor of the power?

If we have shown that the fixing of unreasonable or unjust rates is beyond the power conferred by the California Constitution upon the municipalities of that State, it necessarily follows that such an act is not "State action." This is expressly decided by this Court in the recent United Railroads case and is also sustained by many other authorities, among which are the following:

Risley vs. City of Utica, 179 Fed. 875.

In that case the City of Utica was given by a statute of the State of New York the power to contract for a supply of water for the extinguishment of fires, and to

tax property in the city to pay therefor. It made and continued a contract which was unreasonable and provided for an excessive compensation to the water company.

The Court says:

"If the city has made an illegal or improvident^{nt} and oppressive contract, it has done so 'without the authority of State law,' and 'it is for the State courts to remedy acts of State officers (the Common Council) done without authority of or contrary to State law.' If on appeal to such courts the illegal acts done in violation of the rights of the citizens of Utica under the provisions of the Constitution of the United States are upheld as legal and valid, then the State has adopted them, and they become its acts, and an appeal may be had to the courts of the United States."

And again at pages 883-4:

"If there was no law of the State authorizing this action, then it was the act of the city officers, or State officers clothed by the State with the power of taxation, done 'without the authority of State law,' and 'it is for the State courts to remedy acts of State officers done without authority of or contrary to State law.'"

Owensboro Water Co. vs. Owensboro, 200 U. S. 38, 50 L. Ed. 361.

In that case it was held that an act of a municipal corporation diverting a fund raised by a bond issue (which issue was authorized by the law of the State) from the original purposes for which it was raised, did not constitute State action. The Court referred to the

cases which hold that the prohibitions of the 14th amendment "refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities," and, consequently, "whoever by virtue of public position under a state government deprives another of any right protected under that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state"; and then proceeds:

"These were all cases in which the right sought to be protected was held to have been granted or secured by the Constitution of the United States, but yet was violated by some agency or instrumentality proceeding under the sanction or authority of the State. But no right involved in the present case has its origin in, or is secured by, the Constitution of the United States. It is not contended that the legislative enactments, by the authority of which the city intends to establish and maintain a system of waterworks, are inconsistent either with the Constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant city has not properly discharged its duties under the laws of the State. For the purposes of the present discussion, let this be taken as true; still, maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the national government, unless it involves the infringement of some Federal right. If the city authorities have received funds from taxation which ought strictly to have been applied to take up or cancel the bonds of the city, but have been used for other municipal

purposes, and if, by reason of such misapplication of those funds, taxation may ultimately come upon the people for an amount beyond what the legislature originally intended,—if nothing more can be said,—the remedy must be found in the courts and tribunals of the State, and not in the Federal Courts of original jurisdiction, where the controversy is wholly, as it is here, between citizens of the same State. When a Federal Court acquires jurisdiction of a controversy by reason of the diverse citizenship of the parties, then it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the State court. But, as between citizens of the same State, the Federal Court may not interfere to compel municipal corporations or other like State instrumentalities to keep within the limits of the power conferred upon them by the state, unless such interference is necessary for the protection of a Federal right. There has been no actual invasion here of any right secured by the Constitution of the United States; nothing more, taking the allegations of the bill to be true, than a failure of a municipal corporation to properly discharge the duties which, under the laws of the State, it owes to its people and taxpayers. And there is here no deprivation of property without due process of law within the meaning of the 14th Amendment, even if it be apprehended that the defendant city may, at some future time, impose a tax in violation of its duty under the laws of the State.”

IV.

Federal Courts are bound by the interpretation placed upon provisions of a state constitution by the highest court of the state.

Nesmith vs. Sheldon, 7 How. 812-818, 12 L. Ed. 925-927.

“It is the established doctrine of this court, that it will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, when that constitution has been settled by the decision of its highest judicial tribunal.”

Webster vs. Cooper, 14 How. 489-504, 14 L. Ed. 510-517.

“In ascertaining what that law is, this court looks to the decisions of the highest court of the State; and where the question turns upon the construction to be given to the Constitution of the State, and we find a construction made by the highest State Court, very soon after the Constitution was formed, acquiesced in by the people of the State for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it, and apply it to this case, to which, in our judgment, it is justly applicable. Such has been the uniform course of this court. *McKeen v. Delancy's Lessee*, 5 Cr. 22, *Polk's Lessees v. Wendell*, 9 Cr. 87; *Gardner v. Collins*, 2 Pet. 58; *Shelly v. Guy*, 11 Wheat. 351; *Green v. Neal*, 6 Pet. 291, are some of the cases in which this course has been followed, and its reasons explained. The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law en-

acted by the Legislature of a state, and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and this court receives such a settled construction as part of the fundamental law of the State."

Wade vs. Travis Co., 174 U. S. 500-508, 43 L. Ed. 1060-1064.

"In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." (Citing numerous cases.)

West vs. Louisiana, 194 U. S. 258-261, 48 L. Ed. 965-969.

"We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein."

Fairfield vs. County of Gallatin, 100 U. S. 55, 25 L. Ed. 544.

In this case the United States Supreme Court changed its construction of a State Constitution to conform to the construction placed upon the constitutional provisions by the Supreme Court of the State, subsequent to the first decision of the Federal Court.

The rule of the above case is followed in

New Orleans etc. Co. vs. Southern etc. Co., 36
Fed. 833.

In the latter case the United States Circuit Court of Louisiana held that in construing the laws of Louisiana it was bound to follow the decisions of the State Court rather than those of the United States Supreme Court.

Encyclopedia of U. S. Supreme Court Reports,
vol. 4, p. 31.

"It is the province of the supreme court of a state to construe its own constitution and laws."

V.

CONSIDERATION OF CASES ALLEGED TO HAVE BEEN SIMILAR TO THE CASE AT BAR IN WHICH THE JURISDICTION OF FEDERAL COURTS HAS BEEN UPHELD.

The motion for a preliminary injunction in the case at bar was granted by the Judge of the District Court without the rendition of any opinion, such ruling being based upon the opinion of the same Judge in a similar case, to-wit:

S. F. Gas & Electric Co. vs. City and County of San Francisco, 189 Fed. 943.

The opinion in this last case is as forcible a presentation as can be made in favor of the jurisdiction of Federal Courts in rate cases. We respectfully call attention, however, to what seems to us to be erroneous

in the reasoning of that decision and the application of the cases therein cited. Upon page 944 of the opinion referred to it is said:

“This is predicated upon the argument that, conceding that the state has vested in a tribunal or functionary full and plenary power, as here, to do a certain thing, an act done under such authority is not the act of the state in the sense here involved, unless it be so done as to be legally unassailable.”

And again on page 949 of the opinion it is stated that the case then at bar was

“in all material respects analogous to the one where a state has conferred certain jurisdiction upon its courts, where acting within the limits of that jurisdiction no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority.”

These citations do not seem to us to fully recognize the contention of appellants in this case. It is not conceded that *full and plenary* power to fix rates has been delegated by the State to a municipality. On the other hand, it is contended that whatever power has been delegated is a *limited* one and the Supreme Court of California has so decided. The contention here made is that the act of the Board of Supervisors in fixing such rates as are alleged in the bill of complaint in this action is not within the limits of the

power delegated. In that respect the act of rate fixing presents a very different aspect from the act of a Court which undoubtedly has full and plenary power to decide controversies rightfully or wrongfully. In other words the distinction between an act "under the authority" of a delegated power and "within the limits" of that power does not seem to us to be recognized in this opinion.

It is further submitted with regard to the opinion referred to that there is a material difference between the act of a municipal corporation repudiating a contract theretofore entered into by that corporation and the act of the same corporation in fixing rates under the constitutional authority. Some of the cases cited in the opinion of the District Court involved the effect of franchises granted by municipal authorities which were held to be inconsistent with and a repudiation of contract obligations arising out of other franchises previously granted. Such acts are distinguished from a mere *ultra vires* assertion of power. For that reason it is submitted that those cases are not authority as to the question now before the court.

In the case of *Raymond vs. Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78, referred to on page 946 of the opinion, the State Board of Equalization, against which the action was brought, is stated in the opinion to have been "clothed with the state's powers."

As pointed out by Judge Wellborn in the Home Telephone case there is a material difference between a state body of this character acting under the law of the State Legislature and the act of a municipal body acting under delegated power.

In *Michigan Central Ry. Co. vs. Powers*, 201 U. S. 245, 50 L. Ed. 744, the action was brought against the Auditor General of the State to restrain the enforcement of a law of the state and the same distinction applies.

In *Des Moines City Railway Company vs. City of Des Moines*, 151 Fed. 854, the question presented was as to the conflicting rights alleged to be held under the grant of two street railway franchises. It was held that the granting of a second franchise was an attempted impairment of the contract created by the first and therefore was not simply an *ultra vires* act but was a breach of a contract. The Court said, page 861:

"The entire error is in assuming that the resolution of November 21, 1905, is *ultra vires*, instead of saying that it is a repudiation, and an attempted impairment of a contract."

The decision is based upon the ground that the city authorities had recognized and construed the first ordinance as being one granting a perpetual authority to the company therein named and hence that the city could not repudiate that contract. The opinion suggests that a different rule as to jurisdiction might apply if the act complained of was simply an *ultra vires* act of the municipal body.

In *Manigault vs. S. M. Ward Co.*, 123 Fed. 707, the action was brought to enjoin the erection of a dam which was being erected under direct authority of an act of the Legislature of South Carolina. The ground of the objection was that such a structure would interfere with the navigation of a navigable stream, which is

prohibited by the constitutions both of the United States and the State of South Carolina. There was no question here but that the acts complained of were being done under full legislative authority of the state. The point of the decision is, that when an act admittedly violates the provisions both of the United States and the State constitution the complainant has his choice of either a Federal or State forum. We do not question the correctness of such a decision but do not see that it bears on the question now before the court.

In *Ozark-Bell Telephone Co. vs. City of Springfield*, 140 Fed. 666, there is no consideration of the limits of the power conferred by the state upon the city. The court say, page 669:

“Since the city was empowered by the Legislature of the State to act, the action taken was the action of the State through one of its agencies.”

The correctness of this view may be conceded provided that there is no limitation upon the power by which the Legislature of the State has authorized the city to act; but if such limitation exists an act beyond such limits would not be the act of the State.

The decision in the *City of Louisville vs. Cumberland T. & T. Co.*, 155 Fed. 725, was to the effect that the Federal Court had no jurisdiction of the action for the reason that the complaint alleged that no power to regulate rates had been granted to the city. If the decisions of the Supreme Court of California to the effect that no power to fix unreasonable or unjust rates has been delegated to the city are followed, this last case is authority for appellants in the case at bar. In

other words, in the case at bar no power has been conferred upon the city to fix rates of the character and in the manner alleged in the Bill of Complaint in this action.

The case of *Citizen's Railroad Company vs. City Street Ry. Co.*, 56 Fed. 746, is similar to the Des Moines case above referred to in that it involves the attempt of a municipality to repudiate a grant of authority under a street railway franchise. Immediately following the quotation from this opinion which is found in the opinion of the District Court in the San Francisco Gas and Electric Company case the Court says:

"If the law of the state or a municipal grant under its authority, is a valid enactment, except for its repugnancy to the provisions of the constitution which prohibits a city from passing any law impairing the obligation of contracts then such repugnancy presents a federal question and gives this court jurisdiction."

The above quotation suggests the same difference between a repudiation of a contract liability and an act of a municipal body in fixing rates under a delegated authority, which is hereinabove discussed in connection with the Des Moines case.

VI.

Scope of this Brief.

We have intentionally omitted from this brief any discussion of the recent decisions of this court in the Seattle and United Railroads case or of the authori-

ties therein relied upon. Nothing that can be said herein will add force to the logic of those decisions. The order of the Supreme Court made on June 7, 1912, denying the petition of appellees in the latter case for a writ of *certiorari* shows that Court to be entirely satisfied with the decision of this Court.

As stated in a preceding portion of this brief it is submitted that those decisions settle the law in this circuit to the effect that an act of a municipal body which is contrary to the provisions of a State law is not State action. It is further submitted that the same principle must apply to an act of a municipal legislative body which is beyond the power delegated to it, and, that therefore, all that is necessary for appellants to establish in this case is that the fixing of such rates as are alleged in the Bill of Complaint was beyond the power of the Board of Supervisors of the City and County of San Francisco. That question has been settled by the decisions of the California Supreme Court hereinabove cited.

We have also intentionally omitted to burden this brief with the citation and discussion of many cases bearing on the point involved in this appeal, believing that our position is sustained by the cases cited.

It is respectfully submitted that the District Court had no jurisdiction of this action, and the order appealed from should therefore be reversed.

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APPENDIX.

Decision of Judge Welborn in Home Telephone case, referred to in foregoing brief.

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, a corporation, Complainant, vs. THE CITY OF LOS ANGELES et al., Defendants.

CONCLUSIONS OF THE COURT ON MOTION FOR A TEMPORARY INJUNCTION.

The main, if not only, question on this hearing relates to the meaning and effect of the decisions hereinafter cited of the Circuit Court of Appeals of this Circuit.

With great deference to the learned judge, who wrote the opinion in *San Francisco Gas & Electric Co. vs. City and County of San Francisco et al.*, 189 Fed. 943, I am unable to adopt his interpretation of *Seattle Electric Company vs. Seattle R. & S. Ry. Co.*, 185 Fed. 365; on the contrary, the latter case, it seems to me, holds directly, that, where an ordinance of a city is prohibited by the constitution of the State, that ordinance for the purpose of Federal jurisdiction, is not State action.

The city of Seattle had general power to grant franchises for street railways. This is not expressly stated in the bill, but it must be true, otherwise the complain-

ant itself would have had no standing in court, as the rights it sought to protect depended upon a franchise granted by the same municipality. Therefore the ordinance complained of was not *ultra vires*, but simply an improper or illegal exercise of a general power, and the court held squarely, that said ordinance could not be considered State action, because it was prohibited by the State constitution.

A petition for rehearing was filed, in which, referring to the authorities on which the court based its decision, it was said:

“An examination of these authorities shows that the rule under consideration in all of them is this only: That the Circuit Court has no jurisdiction where the acts against which relief is sought are acts ‘of state officers done without authority of, or contrary to, state laws,’ or the threatened action is under ‘an ordinance to which the state has not in any form given or attempted to give the force of law’ The case of *Barney vs. City of New York*, *supra*, was a case of the first kind. The case of *Hamilton Gas Light Co. vs. Hamilton City*, *supra*, was a case of the second kind. The cases from which the statement contained in the Encyclopedia above cited is drawn, and which are cited in a foot note in support of the contention, are all of the one character or the other. *In no one of them was the point involved or decided that because the action in question was in violation of the state constitution it was therefore not the act of the state and the protection of the fourteenth amendment to the United States constitution accordingly was not to be invoked against it.*”

Representatives of the Spring Valley Water Company of San Francisco, appearing as friends of the court, said:

"The public attention already given to this portion of the opinion (portion above quoted) is sufficient evidence of the interpretation likely, at any rate, at first glance, to be put upon it. It has been generally declared that the principle thus laid down necessitates the dismissal of actions instituted by public service corporations in the United States Circuit Court to enjoin the collection of rates fixed by public authorities, but claimed to be confiscatory. It seems to us that the opinion in its present form is susceptible of this construction."

The petition for rehearing was denied by the Court.

The construction placed upon the Seattle case by the periodicals referred to in *San Francisco G. & E. Co. vs. City and County of San Francisco*, *supra*, namely; 23 Green Bag 123 and 4 Lawyer & Banker 132, accord with the conclusion which I have above announced.

Furthermore, a like question was subsequently before the Circuit Court of Appeals of this Circuit in *City and County of San Francisco vs. United Railroads of San Francisco*, 190 Fed. 507, advance sheets, and there the court said:

"In that case" (the Seattle case) "the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law, was alleged in the bill to have been granted illegally and without right and to be 'without authority in law, and null and void and of no force and effect.' We held, following the cases

above cited, that, taking these averments to be true, the ordinance complained of was not the act of the state and that there was no federal question involved. When it comes to the question whether the ordinance of a municipality is or is not legislation by the state, there can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

It is true, that the bill in the present case alleges, that, if the ordinance complained of "is enforced, and your complainant thereby prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law," etc. This charge, however, that the ordinance complained of is State action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly pro-

hibited by the Constitution of the State, which, in Article I, Section 13, expressly provides, among other things:

“No person shall * * * be deprived of life, liberty or property without due process of law.”

Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

“What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contract have been enacted in violation of the positive law of the state.”

I know of no case where the Supreme Court of the United States has held, that an ordinance of a city manifestly in violation of an express provision of the state constitution is action by the state. It is true, that, in *Des Moines City Railway Co. vs. City of Des Moines*, 151 Fed. 854, the trial court so held, but, on appeal, the Supreme Court, without making any reference to the views of the trial court, reversed its decision on another ground. (214 U. S. 179.)

In *Raymond vs. Chicago Traction Company*, 207 U. S. 20, the act complained of was that of the State Board of Equalization, which was “one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation.”

In *Michigan Central R. Co. vs. Powers*, 201 U. S. 245, and in *Manigault vs. S. M. Ward Company*, 123

Fed. 127, affirmed in 199 U. S. 473, the acts complained of were statutes enacted by the legislatures of the States.

Said agencies, the Board of Equalization and the State legislatures, are distinguishable from a municipal body, which does not act in the name of the State, and is not created for general State purposes, but purely local needs, and, while under some circumstances the act of the latter may be considered the act of the State, it may well be said, that its ordinance obviously in violation of a positive law of the State is not the act of the State.

Following the decision of the Circuit Court of Appeals of this Circuit in the Seattle and San Francisco cases, as above construed, I hold, that the ordinance complained of in the case at bar is not the act of the State, and accordingly the application for a temporary injunction will be denied, for lack of Federal Jurisdiction.

OLIN WELLBORN,
Judge.

[Endorsed]:

C. C. No. 1685 U. S. District Court, Southern District of California. Southern Division. *Home Telephone & Telegraph Co. vs. The City of Los Angeles et al.* Conclusions of the Court on Motion for a temporary Injunction. Filed Feb. 13, 1912. WM. M. VAN DYKE, Clerk. By C. E. SCOTT, Deputy Clerk.

No. 2176

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO
(a municipal corporation) et al.,

Appellants,

VS.

SPRING VALLEY WATER COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

This is an appeal from an order of the District Court, Northern District of California, Second Division, granting a temporary injunction enjoining the defendants from attempting to enforce the provisions of an ordinance adopted on June 26, 1912, by the board of supervisors of the City and County of San Francisco, fixing water rates for the fiscal year commencing July 1, 1912, and ending June 30, 1913.

The application for the injunction was based upon the bill of complaint, various affidavits filed by complainant, and one affidavit filed by defendants. It has been, by stipulation, agreed that the only question in-

volved upon this appeal is the jurisdiction of the district court to make the order referred to, and that if that court had jurisdiction, the order was properly made. That question, it is further stipulated, is to be determined by a consideration of the allegations in the bill of complaint and defendants' affidavit.

Statement of the Case.

The bill of complaint is of considerable length and we shall consider only such of its allegations as are, in our view of the case, material to the question involved on the appeal.

It is alleged that complainant is a corporation engaged in supplying water to the City and County of San Francisco and its inhabitants, and that its right to do so arises from an act passed on the 23rd day of April, 1858, entitled, "An Act to authorize George H. Ensign and his associates to lay down water pipes in " the public streets of San Francisco", and from article XIV, section 1, of the constitution of the State of California; that, pursuant to the privileges and rights thus granted, and in order to fulfill the purposes for which it was created, complainant acquired necessary lands, water rights and reservoir sites in, and in proximity to, the said City and County of San Francisco, and constructed and installed pumping stations, pipe lines, distributing systems and other necessary works; that the present value of complainant's property is in excess of the sum of fifty million dollars; that com-

plainant has furnished, at all times in the past, and is now furnishing to the inhabitants of San Francisco an adequate supply of pure fresh water for domestic uses and fire protection; that ever since its incorporation and up to the present time it has complied with the constitution of the State of California and all the laws of the State of California; that, under the laws in force prior to 1879, the grantor of complainant was required to supply the City and County of San Francisco with water for the extinguishment of fires gratuitously, and that the rates to be charged for the supply of water to consumers were determined by a board of five commissioners; that in 1879 the constitution of that year, which is generally known as the "New Constitution", was passed, and that it was, among other things, provided in that constitution as follows:

"ARTICLE XIV.

WATER AND WATER RIGHTS.

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; *provided*, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in

the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use."

That, pursuant to the power thus delegated, and the duty thus enjoined, the board of supervisors of the City and County of San Francisco did, on June 24, 1912, pass an ordinance fixing the maximum rates to be charged to the City and County of San Francisco and the inhabitants thereof for the fiscal year commencing July 1, 1912, and ending June 30, 1913, said ordinance being set forth in full as an exhibit to the complaint; that complainant is entitled, under the provisions of the constitution of the United States, to a return of at least 7 per cent upon the value of its property used and useful in supplying the City and County of San Francisco with water, in addition to a sufficient sum to cover operating expenses, taxes, charges for depreciation, obsolescence, and loss by extraordinary casualties; that the maximum amount which would be received by complainant, if the provisions of the said ordinance were in force for the fiscal year, would be two million seven hundred and fifty-five thousand dollars; that the operating

expenses, taxes and charges for depreciation, obsolescence and loss by extraordinary casualties, would be in excess of one million six hundred thousand dollars; that there would remain, as the total income to be derived by complainant during said fiscal year, a sum not in excess of one million one hundred and forty-five thousand dollars;

“that it is provided in and by the fifth amendment to the constitution of the United States that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, and that by the fourteenth amendment to the constitution of the United States it is further provided that ‘no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law’; * * * that this action is a case in equity arising, and that it arises, under the constitution of the United States, and that the judicial power of the Honorable court, above-entitled, extends to and embraces this action and its issues, * * * and that the issues herein and in this action set forth involve federal questions under said constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel complainant to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water, without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the

said provisions of said constitution of the United States, and by reason of and under said provisions are void and null; and that under said ordinance complainant would, and will, be compelled to furnish water to said city and county and its inhabitants at less than the fair, reasonable and just value of the service rendered, and that by the enforcement of said rates and said ordinance complainant would be and will be deprived of property without due process of law, and will be deprived of property without any process of law, in violation of the provisions of the constitution of the United States; and that by such enforcement its property would be and will be taken for public use without just compensation and, in some instances, without any compensation, and that by such enforcement the privileges and immunities of complainant would be and will be abridged and the equal protection of the law denied to it, in violation of the provisions of the constitution of the United States; * * * that the said bill or ordinance, Exhibit 'A', fixes the rates to be charged for supplying water to the said city and county and its inhabitants for said fiscal year 1912-1913, but that the same was adopted without due process of law and not according to the provisions of law and in a manner that deprived and deprives complainant of the equal protection of the law for the reasons hereinbefore and hereinafter stated, and that the rates thereby fixed are wholly illegal and unconstitutional under the said provisions of the constitution of the United States, and are unauthorized, and if enforced will result in depriving complainant of its property without due process of law; * * * that said bill or ordinance, and all proceedings of said board at said meeting on June 24, 1912, in reference thereto, and all of the meetings of said board in reference thereto, were and are contrary to and violative of said provisions of the constitution of the United States and void thereunder, and that therefore said ordinance will, if enforced, deprive com-

plainant of its property without due process of law, and abridge the privileges and immunities of complainant, and deny to it the equal protection of the laws; * * * that said bill or ordinance is, and the rates purported to be fixed thereby are, wholly void, null, unjust, unreasonable, fraudulent and unconstitutional under the said provisions of the constitution of the United States, and oppressive and confiscatory and ambiguous, uncertain and unintelligible, and that the said rates do not permit of, or provide for, a just or fair or reasonable compensation for water to be supplied during said year by complainant, or any other person, to said city and county and its inhabitants, and that if said bill or ordinance is enforced complainant's gross income for said fiscal year, after deducting operating expenses and taxes, a proper charge for depreciation and obsolescence, and a proper charge for replacement of portions of complainant's plant which may be destroyed by extraordinary casualty, will be insufficient to pay any dividend whatever during said fiscal year to the stockholders of complainant in excess of two per cent upon the value of the property of complainant necessary to be used in supplying water to said city and county and its inhabitants."

That the matter in dispute, exclusive of interest and costs, exceeds the sum of five thousand dollars; that complainant has no plain, speedy and adequate remedy at law. The prayer of the bill is that the said ordinance be decreed to be null and void and of no effect, that temporary and permanent injunctions issue, and that other incidental relief be granted.

It was upon this showing that the district court took jurisdiction and made the order now appealed from. As we have said, the only question with which the court on

this appeal is concerned is as to whether or not that jurisdiction was properly assumed; and if this court reaches the conclusion that a federal question is involved when a California municipality, through its board of supervisors, enacts a confiscatory ordinance, the order of the lower court must be affirmed. The question is one of jurisdiction, and jurisdiction alone.

JURISDICTION OF FEDERAL COURTS.

The constitution of the United States, article III, section 1, provides:

“The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish.”

Section 2 of the same article is as follows:

“The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority.”

Article VI provides:

“This constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

It is provided in article XIV of the amendments, section 1:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Section 5 of the same article contains a grant by which Congress is given power “to enforce by appropriate legislation, the provisions of this article”.

Under the authority of the constitution, Congress passed the Judiciary Act which provided:

“that the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, where the amount in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States or treaties made, or which shall be made, under their authority.”

It is provided in the Judiciary Act which became effective January 1, 1912, as follows:

“Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.” (Section 291.)

The district court has jurisdiction, therefore, in any case arising under the constitution of the United States. In a long line of cases it is held that where a complainant invokes the protection of the constitution of the United States,—that is to say, asserts in good

faith that a right secured to him by that constitution is violated, and asks relief against such violation,—federal courts have jurisdiction to determine the validity of this claim, regardless, of course, as to whether or not the relief sought is ultimately granted. It is the case as made by the pleadings then, and not by the proof, which determines the question.

Mr. Justice Peckham thus stated the rule in

North American Cold Storage Co. v. Chicago,
211 U. S. 305; 53 L. Ed. 198:

“The circuit court held that * * * under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction. * * *

“The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

“We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant’s assertion of jurisdiction was based upon an alleged federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the 14th Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had

jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed.”

We also cite

Nashville etc. Ry. Co. v. Taylor, 86 Fed. 168.

Conceding, then, as we must, that, if complainant asks for the protection of a right which it asserts is secured by the federal constitution, it is entitled to have the validity of the right determined by the federal courts, we must further admit that the nature of the question, as long as it arises under the constitution of the United States, has no effect upon the application of the rule. Whether complainant's right and its protection depend upon the construction of an ordinance or the determination of a question of fact only, the principle is the same and the court must take jurisdiction.

As was said in

Hastings v. Ames, 68 Fed. 726, 728,

in an opinion delivered by the Circuit Court of Appeals, Eighth Circuit:

“It is manifest, therefore, that the suits at bar are cases in which it was claimed that a law of a state contravenes the constitution of the United States. The relief prayed for by the plaintiffs was predicated on the express ground that the statute which the appellants were about to enforce was in violation of the federal constitution, and the relief sought was granted by the circuit court on that ground and for no other reason. The cases accordingly fall within the purview of the sixth subdivision of section 5 of the act of March 3, 1891 (26 Stat. 826, c. 517), which declares that appeals

may be taken to the supreme court in the following cases: ‘(6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.’ In opposition to this view it has been suggested that the question which arises on these appeals is simply whether the rates prescribed by the Nebraska statute are unreasonable and unjust, and that this is not a constitutional question, but an ordinary issue of fact. It is true, no doubt, that the issue is one of fact; but a finding is required upon that issue solely for the purpose of deciding the ultimate question, which arises in the several suits, whether the state statute prescribing the rates is constitutional or otherwise. When the validity of a statute is challenged on the ground that it violates the organic law, it is ordinarily the case that the question can be determined by a simple inspection of the statute; but it may happen, as in the present case, that it can only be determined in the light of extrinsic facts which serve to demonstrate the necessary effect, and operation of the statute. Now, it matters not, as we think, how a decision in such cases is to be reached, whether it be by a simple comparison of the statute with those limitations upon legislative power which are imposed by the constitution, or by an investigation and decision of a preliminary issue of fact.”

The foregoing decision was approved in

Ex Parte Young, 209 U. S. 126; 52 L. Ed. 714,
722,

in the following language:

“Jurisdiction is given to the circuit court in suits involving the requisite amount, arising under the constitution or laws of the United States (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), and the question really to be determined under this objection is whether the acts of the

legislature and the orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution, nevertheless, is one which raises a federal question. See *Hastings v. Ames* (C. C. App. 8th C.), 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726. The sufficiency of rates with reference to the federal constitution is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature.”

The following cases are to the same effect:

Perkins v. Northern Pacific Ry. Co., 155 Fed. 445;

Capital City Gas Co. v. Des Moines, 72 Fed. 822.

In the very nature of things such must be the rule. Were it not so, and were it true that, in a case involving the determination of a federal question where the only disputed points are as to the existence of the facts alleged in the complaint, complainant could not resort to the federal court and invoke its jurisdiction in the first instance, he would be deprived of a protection guaranteed by the supreme law of the land. Not only would the decision of the state court be successfully pleaded as a bar to a subsequent action in the federal court, but in the action first instituted in the state court, a writ of error to the Supreme Court of the United States would only secure a review of the law, and would not change the state court's findings of fact. A different rule from that set out above would, therefore, violate one of the fundamental reasons for the establishment and continued existence of the federal

courts. The rule itself, and the reason for it, are forcibly expressed in

Prentiss v. Atlantic Coast Line Co., 211 U. S.
210, 228,

from which we quote:

“If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. *All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent.*”

In such cases the jurisdiction is, of course, concurrent and not exclusive. A litigant may choose the forum in which he desires to have his rights determined, but when the federal court once takes jurisdiction it then becomes exclusive and cannot be impaired by the action of any state court. The rule is thus expressed by Mr. Chief Justice Waite:

“The original cognizance here is ‘concurrent with the courts of the several states, for the presumption is, and justly so, that the courts of the states will do what the constitution and laws of the United States require.’ ”

St. Louis Railway Co. v. Southern Express Co.,
108 U. S. 24.

The following cases announce and follow the same rule:

Willcox v. Consolidated Gas Co., 212 U. S. 19;
Ex Parte Young, 209 U. S. 160;
Smyth v. Ames, 169 U. S. 466;
City of New Orleans v. Benjamin, 153 U. S. 24;
Nashville etc. Ry. Co. v. Taylor, 86 Fed. 168.

No question of comity in the assumption of this jurisdiction is, of course, involved. If a case is presented which involves a federal question, and the jurisdiction of the federal court is invoked, it is the unquestioned duty of that court to assume the jurisdiction.

As was said by Mr. Chief Justice Marshall, in

Cohen v. Virginia, 6 Wheat. 404,

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”

In cases, then, in which the complainant states a cause of action substantially, and not colorably only, involving a right secured by the constitution of the United States, whether the determination of that right involves a question of fact or a question of law, the courts of the state and of the United States have concurrent jurisdiction; and the litigant has the choice of the forum to which he will go for protection. Neither has exclusive power; neither may reject jurisdiction when its assistance is sought; while neither may, by

its action after the moving party has made his choice, impair the power of the other tribunal to decide the issues submitted to it for determination.

**WHERE THE REGULATION OF RATES IS CLAIMED TO VIOLATE
THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION,
HAVE THE FEDERAL COURTS JURISDICTION?**

It is conceded by counsel for appellants that, under certain circumstances, the federal courts have jurisdiction to determine the validity of rates established by state legislatures, municipal corporations, commissions and other agencies of the state. The large number of cases prosecuted to, and determined by, the Supreme Court of the United States in which the question has been considered and passed upon would furnish a complete answer to a contrary contention if such were advanced. Appellants argue, however, that the present case does not come within the category. We shall see in a moment upon what they rest this argument, but before coming to that let us state the principles upon which the jurisdiction has been rested.

The fourteenth amendment to the constitution of the United States is in the following language:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

Since the passage of this amendment, its protection has most frequently been invoked by public service corporations against the enforcement of ordinances fixing the rates they may charge for the service rendered by them, upon the ground that those rates, if enforced, will violate the security afforded by that provision. Aside from the necessity that the amount involved shall be in excess of \$2000, there are two requirements, and two only, with which a complainant must comply before he can rightfully bring his action in a federal court. He must show (1) that the rate established will, if enforced, abridge his privileges or immunities as a citizen of the United States, or that he is, by the passage of the ordinance fixing rates, deprived of his property without due process of law or denied the equal protection of the law. (2) He must, in the second instance, show that the action complained of, that is, the passage and enforcement of the rate, is action by the state. With the pleading satisfactorily setting forth these facts, one who considers himself wronged may resort for redress either to the state or federal courts, and the tribunal of his choice must hear his claim and determine its validity. This is only, of course, the application of the general rule, heretofore discussed, to the specific instance where the validity of the rate fixed is the issue in the case. The question upon which the ultimate determination may hinge, whether it be a question of law or of fact, has no effect upon the

right and duty of the federal court to act. The jurisdiction must be assumed if a substantial claim is made that the rate, if enforced, will violate the right guaranteed by the federal constitution, and that the state is seeking to enforce the rate. This proposition is fundamental and requires no citation of authority. It, and it alone, supplies the warrant for action by the federal court in every case where it has assumed jurisdiction in cases involving rate regulation.

In the case at bar it is conceded that facts were pleaded and proved sufficient to show that complainant would, if the ordinance referred to in the complaint were enforced, be deprived of its property without due process of law; that the rates fixed were unreasonable and confiscatory and would afford to complainant neither a fair return for the service rendered, nor a reasonable rate based upon the value of its property devoted to supplying the City and County of San Francisco with water. Appellants do not, however, concede that the action of the board of supervisors in passing that ordinance was state action, if, in fact, the ordinance was confiscatory, but, on the contrary, insist that in that event it was not action by the state. The sole question in the case is thus directly presented: Was the action of the board of supervisors of the City and County of San Francisco, in passing the ordinance of June 24, 1912, action by the State of California? It is to a consideration of this question that we now proceed.

THE PASSAGE OF THE ORDINANCE WAS STATE ACTION.

Appellants' argument that the passage of the bill prescribing rates which appellee might charge for water during the fiscal year 1912-13 was not state action is twofold. The two contentions are substantially these: (1) The Supreme Court of California has decided that the City and County of San Francisco, through its supervisors, has the power to fix rates to be charged by complainant, but that the only rates which it can pass *and enforce* are reasonable and just rates. Since it is alleged in the complaint that the rates under discussion in the case at bar are unreasonable and unjust, complainant shows on the face of its pleading that the act complained of was not enforceable by the state and was, therefore, not state action. (2) The constitution of the State of California contains a provision which prevents, in language similar to that employed in the federal constitution, the taking of property without due process and the taking of private property for public use without just compensation. This provision, being a part of the organic law of the state, must be read into the provision granting to the municipal authorities the power to fix rates. The power granted, it is then asserted, being one to fix rates, is still one only sufficiently broad to warrant the fixing of such rates as will not deprive complainant of its property without due process of law, or infringe any other of its constitutional guaranties.

The two grounds, thus assigned, in support of the contention that we have not shown in our pleading that

the state has acted are so closely interwoven that they cannot, to advantage, be treated separately. They may, we think, be accurately stated thus: The municipality has only been given power to enact rates which are reasonable, just and not confiscatory. Complainant pleaded that the rates passed were unreasonable, unjust and confiscatory, and, therefore, is not complaining of state action, and the federal court is consequently without jurisdiction.

The argument predicated by counsel upon those decisions rendered by the Supreme Court of California, referred to by him, is that the constitution of the state, because of those decisions, must now be treated as containing a provision that rates shall be reasonable and just. The rendition of those decisions, is, we feel sure he will concede, not important; it is the fact, that the constitution contains a provision prohibiting the taking of property without due process of law, and therefore, by implication, the rule that rates fixed by a municipality must be reasonable, that furnishes the basis of his argument. Those cases are merely decisions of the courts of this state interpreting the supreme law of the land. They neither, of themselves, add to or detract from the provisions of the constitution, but hold, as they were bound to hold, that by fixing unreasonable and unjust rates the municipality "exceeds the powers conferred upon it", and that the rates so fixed are not enforceable.

We shall, therefore, consider the second branch of counsel's argument and assume that if we can show that to be unsubstantial, the first is likewise invalid.

The question then, which we propose to discuss is the question whether the fixing by a municipality of rates to be charged by a water company, ceases to be state action where the rates fixed are confiscatory, even though it is admitted that the laws of the state expressly confer upon the municipality the general power to fix the rates which such a company may charge.

WHAT IS STATE ACTION?

The answer to this question decides the issues raised in the case at bar.

It is conceded that a state may act through any agency to which it sees fit to delegate its power,—legislative, executive and judicial. The problem is not, then, as to the power to delegate, but as to what actions of the agency to which the power is delegated are actions by the state in contemplation of law. To state first, the converse of the rule for which we are about to contend, we concede that the state has not acted when individuals, even though they may be state officials, violate property rights, where there is no law of the state which even purports to confer upon them the authority to so act. Redress in such cases must be had in the courts of the state.

This rule is clearly illustrated by the following cases:

Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. p. 624;

Owensboro Water Works v. Owensboro, 200 U. S. 38;

Hamilton Gas Light Co. v. City of Hamilton,
146 U. S. 258;

*Louisville Railway Co. v. Cumberland Tel. &
Tel. Co.*, 155 Fed. 725;

Barney v. New York, 193 U. S. 430.

The very large proportion of those cases in which litigants were forced to seek their remedy in the state courts were those in which municipal ordinances were attacked on the ground that they were wholly unauthorized by the state, the legislative body of the municipality having no power under the state law to pass any ordinance whatever of the kind in question. If there was this lack of power, there was not state action and no federal question was presented.

In the Memphis case it was, for instance, alleged that the municipality had not been given power to pass the ordinance complained of either

“by express terms or necessary implication * * * and that the attempt to do so * * * was an attempt to exercise a power which the city wholly lacked”.

In the Hamilton case it was alleged that there was no statute of Ohio authorizing the construction by the municipality of the gas works, the establishment of which was complained of, but the court's jurisdiction was sustained because it appeared that the defendant

“grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own upon that section of the municipal code of Ohio.”

So, in the Barney case, the complaint stated that the Board of Rapid Transit Railroad Commissioners did not have under the state law any authority whatever to construct the particular subway in question. In discussing the bill it was said that the complaint

“on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislature and, hence, was not action by the State of New York within the intent and meaning of the fourteenth amendment, and the circuit court was right in dismissing it for want of jurisdiction.”

It was further said that

“controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Plaintiff’s grievance was that the law of the state had been broken, and not a grievance inflicted by the action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without authority, or contrary to, said laws”.

It may be taken to be the rule, then, that the action of officers or subordinate bodies of a state, wholly outside of color of authority in law, is not state action. When, however, there is authority in an officer or subordinate body to perform a certain act, such as, for instance, fixing rates, and when an act of the character authorized is performed by that officer or body, but in such a manner as to amount to a taking of property without due process, has the state acted? In other words, has a state acted when an agency, to whom is given power to fix rates, fixes rates which are unrea-

sonable and confiscatory, and which, if enforced, will deprive a citizen of his property without due process of law?

The answer to this question, we believe, is found in express decisions of the federal courts squarely in point.

We shall consider first, those cases in which the question has been either directly or indirectly adjudicated by the Supreme Court of the United States, and then turn to some of the other federal decisions.

In

North American Cold Storage Co. v. Chicago,
211 U. S. 305, 53 L. Ed. 195,

the jurisdiction of the court was invoked on the ground that a municipal ordinance providing for the seizure and destruction of food in cold storage, when unfit for human consumption, violated the fourteenth amendment to the constitution. It does not appear what power of the state was delegated, but the constitution of Illinois contained a provision with regard to "due process" practically the same as that of California.

Mr. Justice Peckham, in delivering the opinion of the court, said, as follows:

"In this case the ordinance in question is to be regarded as in effect a statute of the state, adopted under a power granted it by the state legislature, and hence it is an act of the state within the 14th amendment. *New Orleans Water Works Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741."

* * * * *

The circuit court held that

“under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

* * * * *

“The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

“We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant’s assertion of jurisdiction was based upon an alleged federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the 14th amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed.”

In

Raymond v. Chicago Union Traction Co., 207 U.
S. 20, 52 L. Ed. 78,

the facts were these:

The constitution of Illinois had created a board of equalization, which was, in terms, required to carry out the provisions of the state constitution, to the effect that “every person shall pay a tax in proportion to the value of his, her, or its property”. Proceedings were brought in the federal court by certain railroads, to enjoin the collection of taxes alleged to have been improperly equalized. The bill alleged that by the improper equalization complainants’ rights under the fourteenth amendment were violated. It was claimed that no federal question was presented, because the action of the state board was contrary to the constitution and the laws of Illinois, and it would be presumed that the state courts would afford adequate relief, and the dismissal of the action was sought, as it is here sought, upon the authority of cases like

Barney v. New York, supra,

and

Hamilton Gaslight Co. v. Hamilton, supra.

Mr. Justice Peckham, in delivering the opinion of the court, upheld its jurisdiction, and affirmed the judgment of the trial court. We quote from his opinion, as follows:

“Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the 14th Amendment are not confined to the action of the state through its legislative, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state

government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state." * * *

"The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property', was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination which, under these facts, was the action of the state through the board. *Barney v. New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

The dissenting opinion of Mr. Justice Holmes shows that the question here presented was squarely passed upon and determined. We quote from it, as follows:

"It seems to me that the appellee should not be heard until it has exhausted its local remedies; that the action of the state board of equalization should not be held to be the action of the state until, at least, it has been sanctioned directly, in a proceeding which the appellee is entitled to bring, by the final tribunal of the state, the supreme court. I am unable to grasp the principle on which the state is said to deprive the appellee of its property without due process of law because a subordinate board, subject to the control of the supreme court of the state, is said to have violated the express requirement of the state in its constitution,—because, in other words, the board has disobeyed the

authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property. I should have thought that the action of the state was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the supreme court, had said that it sanctioned the alleged wrong. *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502."

In

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 50 L. Ed. 744,

the court was called upon to consider the validity of a certain act, which provided for the assessment of the property of a railroad, and certain other companies, for the levying of taxes thereon by a state board of supervisors, and for the collection of such taxes.

We quote from the opinion of Mr. Justice Brewer, as follows:

"The unconstitutionality of a statute may depend upon its conflict with the constitution of the state or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the state is the final authority (*Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited in the opinion); while, in the other case, the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the federal court and by this suit and conflict with both constitutions is alleged. Undoubtedly, a federal court has the jurisdiction, and, when the question is properly presented, it may often become its duty,

to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the federal constitution, may be presented in a single suit, and call for consideration and determination.”

City of Cleveland v. Cleveland City Ry. Co., 194
U. S. 516, 48 L. Ed. 1102,

was an action in which it was alleged in the bill that a certain ordinance passed by the City of Cleveland impaired the obligation of a certain contract formerly entered into between complainant and the city. From the opinion of Mr. Justice White, we quote as follows:

“The statutes show that there was lodged by the legislature * * * of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.

“That in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts.”

The Ohio constitution contains the same provision regarding "due process" as does that of California.

.From

Barney v. City of New York, 193 U. S. 430, 48 L. Ed. 737,

the so-called New York Subway case, the opinion in which was written by Mr. Chief Justice Fuller, we quote as follows:

"And so in *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 38 L. Ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission 'in a court of competent jurisdiction in Travis County, Texas', and a citizen of another state sued them in the circuit court of the United States for the district which embraced Travis County, and this was held to be authorized by the state statute.

"And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.

"Similarly in *Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 421, where a public board was given power to improve streets, and proceeded in excess of its powers, but not in violation of them, its action was regarded by Mr. Justice McKenna, then circuit judge, as state action.

"In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

In

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 683, 42 L. Ed. 630,

Mr. Justice White, in considering the question of jurisdiction, directly raised and argued, said:

“By the 5th section of the act of March 3, 1891, creating the circuit court of appeals (26 Stat. at L. 826, chap. 517), jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the circuit court ‘in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States’. There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the state of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State of Texas and the city ordinances were in contravention of the constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891.

“Not only were the averments of the bill as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power *which it assumed had been delegated to it by the state*, and were, therefore, *in legal intendment the equivalent of laws enacted by the state itself*. *City Railroad Co. v. Citizens’ Street Railway Co.*, 166 U. S. 557 [41:1114], and cases there cited.”

City Street Ry. Co. v. Citizens' Street R. Co., 166
U. S. 561, 41 L. Ed. 1116.

The action had here been brought upon the ground that defendant had attempted, by the passage of a municipal ordinance, to impair the obligation of a contract entered into with complainant by it. In the lower court, the point now so strenuously urged was directly raised and considered. It was there said:

“It is contended that the constitutional guaranty which prohibits a state from passing any law impairing the obligation of contracts must be read into the state statute, and, thus read, the statute would not confer any authority on the city to make the contract and enact the ordinance in question, and, therefore, no federal question would be involved. If such concession were granted, it is argued that no law of the state, however clearly it might impair the obligation of contracts, would present a federal question, because the bane and antidote would go together. If the constitutional prohibition was read into the state law, the federal question would still remain. The federal question in all such cases is, does the statute of the state, or the grant made by a municipality thereunder, when fairly construed, and treating it as otherwise valid, present a case falling within the prohibition of the constitutional guaranty in question? If the law of the state, or a municipal grant under its authority, is a valid enactment, except for its repugnancy to the provision of the constitution which prohibits a state from passing any law impairing the obligation of contracts, then such repugnancy presents a federal question, and gives this court jurisdiction. Such a case is exhibited by the bill of complaint.” (56 Fed. 746.)

When the Supreme Court of the United States was called upon to determine the correctness of the trial

court's ruling, it was affirmed. We quote, as follows, from the opinion of Mr. Justice Brown:

"1. There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be."

* * * * *

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

* * * * *

"That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the general assembly of March 9, 1891, known as the City Charter, the 59th section of which enacted that 'the board of public works shall have power * * * to authorize and empower by contract telephone, telegraph, electric light, gas, water, steam, or street car, or railroad companies to use any street, alley, or other public place in such city; * * * provided, that such contract shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation of this contract was not a question which

could be properly passed upon, on a motion to dismiss, so long as the complaint claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one."

We next cite

Murray v. Charleston, 96 U. S. Supreme Ct. Reps. 432, 24 L. Ed. 760.

In determining the validity of a municipal ordinance, directing that a tax assessed by a municipality on its stock should be retained by its treasurer out of the interest due on it to its holders, Mr. Justice Strong, speaking for the court, said:

"It was not until the ordinances were passed, *under the supposed authority of the legislative Act*, that their provisions became the law of the state. It was only when the ordinances assessed a tax upon the city debt, and required a part of it to be withheld from the creditors, that it became the law of the state that such a withholding could be made."

The question has been often presented for determination to the other federal courts. We shall refer only to the opinions which seem particularly in point.

In

Louisville v. Cumberland T. & T. Co., 155 Fed. 725,

the Circuit Court of Appeals for the Sixth Circuit, in an opinion delivered by Judge Lurton, said, as follows:

"If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the

exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises.”

* * * * *

“If the fact be that no provision of the state constitution, or of state law, or of the municipal charter, delegates the state power in respect to the regulation of the charges of telephone companies rendering services within the city of Louisville, the ordinance is void as ultra vires, and its enactment did not violate any prohibition of the constitution of the United States, because not enacted in pursuance of any state authority.”

* * * * *

“The most that can be made of the averments of this bill is that it presents questions arising under the constitution and laws of the state. The remedy in such cases is in the courts of the state. If it shall turn out that the common council *did have general power* to regulate the charges of telephone companies rendering services within the city of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract, or by imposing rates which are unjust and confiscatory, a federal question may arise. But it is not enough to found jurisdiction upon that such a question may arise when the bill expressly avers that the action of the common council is not imputable to the state by charging that no such power had been delegated by the state.”

In

Des Moines City Ry. Co. v. City of Des Moines,
151 Fed. 854,

an action was brought to enjoin a municipal ordinance, which, it was alleged, would deprive complainant of its

property without due process of law. The jurisdiction of the court was attacked upon the same grounds as those here urged. The answer of the court, delivered by Judge McPherson, was as follows:

“Finally it is urged by counsel for the city that the case can be decided under the Iowa constitution, and therefore there is no federal question. That is the rule as to taking a writ of error to the Supreme Court; but it is not the test as to jurisdiction of this court. The contention of the city is because of article 1, section 21 of the Iowa constitution: ‘No law impairing the obligation of a contract shall ever be passed,’ and those other provisions much like recitals to be found in the fourteenth amendment. Thirty-two of the states have a similar provision, and yet time and again from those states have cases arisen and been carried through the Supreme Court without a diversity of citizenship, on federal questions from states, wherein were involved the contract clause, and of taking property without due process of law. It must never be forgotten that the constitution of the United States according to its own recitals in article 6 is as follows:

“ ‘This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.’ And when it is not so, this government will be at an end, and we will again have a confederation. In most cases wherein the United States circuit courts take jurisdiction such courts and the state courts have concurrent jurisdiction. But if the contention of the defendant’s counsel is correct, then in 32 states of this Union United States courts are ousted of jurisdiction by the action of those states, while in the remaining states the jurisdiction remains. The entire error is in assuming that the resolution of November 21, 1905, is ultra vires, instead of saying that it is a repudiation, and an attempted impairment of a contract.”

The case was reversed by the Supreme Court, because it appeared that no contract had been impaired; not, however, because of any lack of jurisdiction.

Ozark Bell Telephone Co. v. City of Springfield,
140 Fed. 666,

was an action brought to enjoin the enforcement of an ordinance regulating telephone rates. The point here raised was vigorously urged upon that court, but did not receive its sanction. From the opinion of Judge Marshall, we quote as follows:

“But it is said that the complainant alleges that the ordinance challenged is in contravention of section 4, art. 2, of the constitution of Missouri, in that it impairs its freedom of contract. It may be admitted that, if the only claim made is that the city has proceeded in a way forbidden by the constitution of the State of Missouri, and for that reason the rights guaranteed by the fourteenth amendment of the constitution of the United States have been infringed, there is no jurisdiction. The whole question would then turn on a construction of the constitution of the state of Missouri, and should be left to the decision of its courts. But the bare averment that the ordinance contravenes the constitution of Missouri states no issuable fact. It is a mere legal conclusion. Nor does the bill present a case of an unlawful interference with its right to contract. The conclusion of the pleader in this respect must be treated as surplusage. The suggestion made on the argument that the state had authorized the city to prescribe reasonable rates, and that, when unreasonable rates were fixed, the action of the city was unauthorized, and cannot be imputed to the state, is answered by the Supreme Court of the United States in *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737, in which case, in discussing *Reagan v. Farmers’ Loan &*

Trust Company, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, it is said, at page 440 of 193 U. S., at page 505 of 24 Sup. Ct. and 48 L. ed. 737:

“ ‘And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.’ ”

In

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113,

a municipal ordinance, which, it was asserted, violated a constitutional guaranty, was under consideration. Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit, among other things, said:

“Was the resolution a law of the state within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution if it impairs the obligation of a contract.”

* * * * *

“The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance.”

* * * * *

“In exercising such an option, the council is acting in a legislative capacity. Its declaration is a law.”

In

Capital City Gas Co. v. City of Des Moines, 72
Fed. 818,

the same argument was advanced and fully considered. We quote, as follows, from the opinion of Judge Woolson:

“It is claimed the constitutional prohibitions invoked by plaintiff are as to state action, and that the bill presents no action by the state. The fourteenth amendment to the United States constitution provides, ‘No state shall make or enforce any law,
* * * nor deny to any person,’ etc. The reasoning on this point is substantially this: The state acts through its legislative body. Such body has established no rates for gas. That body did, however, by its statute of 1888, delegate to certain city councils of the state (that of Des Moines being included) the express power to regulate the price of gas within their city limits. But the power to regulate is a power to establish reasonable rates. If the council fix rates which are not reasonable, it is not acting within the power so delegated to it, but has acted beyond and without such delegated power; and, ex necessitate, such action is invalid, because not within the delegated power. Therefore, the argument proceeds, all that is required is to ascertain the reasonableness of the rates; and as that is determined, so is determined whether the council has acted within or beyond the power delegated to it. Thus no federal question under the United States constitution is involved, but the question is simply and only, is the action of the city council within the power thus delegated to it? If the rate is reasonable, yes; if unreasonable, no. This argument has at least plausible force. It deserves close examination.

“Another branch of the same general line of reasoning may be here stated. Assuming that

whatever action the city council may take as to fixing rates is under the delegated authority conferred by the statute of 1888, above referred to, such regulating or fixing price for gas under the statute, is only a power to fix reasonable rates. And if a rate is fixed which is not reasonable, then, as this act of the council is not that contemplated or authorized by the statute, it cannot be said that the rate is fixed by the state. The act is not authorized by the state, and so the state has not deprived plaintiff of property, etc. Therefore, such fixing of rates is not within the constitutional prohibition relating to action by the state.

“The test which shall determine the correctness of this reasoning is not of difficult application. Had the law making power of the state by statute fixed the rates, and such rates were not reasonable,—and by the term ‘not reasonable’ rate as I am herein using it is meant a rate so low as not to afford a proper and reasonable return, under the circumstances, for service performed, including gas furnished,—if the statute rates were not reasonable, manifestly the law might be decreed invalid, under the doctrine so clearly announced by Justice Brewer in *Ames v. Railway Co.*, 64 Fed. 165.”

* * * * *

“If unreasonable, then the commissioners had gone beyond the power delegated to them, and all that would be required would be to so find, and thereupon, and because of that fact, declare the rates invalid, etc. Yet such was not the method pursued in the Reagan case. There the Supreme Court pursued their inquiry substantially on the lines adopted by the bill in the pending action. In the Reagan opinion the Supreme Court manifestly reason upon the theory that the rates fixed by the commissioners were, according to the provisions of the constitution of the United States, a ‘law’ of the state, though the commissioners exceeded the power

delegated to them when they fixed the rates which the court in that case declared to be not reasonable, and therefore invalid.”

* * * * *

“The opinion of the Supreme Court rendered in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, justifies the assertion that the ordinances of a city, when passed in accordance with the forms of law and under assumed and asserted powers delegated to it, and in a direction wherein such powers might be delegated, is the ‘law’ of the state, within the meaning of that term, as used in the constitutional provisions.”

We have now, with four exceptions, considered the most important of the cases bearing upon the subject. Those exceptions are:

Seattle Elec. Co. v. Seattle S. Ry. Co., 185 Fed. 365;

Pacific Gas & Elec. Co. v. City and County of San Francisco, 189 Fed. 945;

City and County of San Francisco v. United Railroads, 190 Fed. 507;

Home Telephone & Tele. Co. v. City of Los Angeles, C. C. No. 1685.

It is upon three of these that appellants rely; they cite no other authority.

We shall contend that the first three of these decisions directly support the argument we make, and that the fourth is based upon an erroneous construction of the opinion delivered by this court in the Seattle case.

THE SEATTLE CASE.

The material facts of the case are few, and can be briefly stated. The complainant filed a bill in the circuit court, in which it was alleged that it had been granted by the City of Seattle a franchise to operate a street railway in that city, and that the same city had subsequently granted to defendant a franchise to construct and operate a railroad over some of the same streets. It was further alleged that the operation by defendant of its railroad under this franchise would depreciate the value of plaintiff's property; that the later franchise was in violation of the terms of the franchise owned by plaintiff, and had been granted in fraud of its rights; that it was granted illegally and without right by the City of Seattle, and that, by its terms, the property of plaintiff would be taken from it without due process of law, and in contravention of the constitution and the laws of the United States; that the later ordinance was without authority of law, and was null, void, and without force and effect.

An interlocutory decree of injunction was issued by the circuit court, from which an appeal was prosecuted to this court, on the ground that the lower court lacked jurisdiction to make the order. In its consideration of the validity of that contention, this court declared that, in order to give jurisdiction to that court, a federal question must be really and substantially involved. It then pointed out that the claim that a federal question existed in the case at bar was grounded upon an alleged conflict between a municipal ordinance and the fourteenth amendment.

We now quote from the opinion:

“These provisions (referring to the fourteenth amendment) have reference to state action exclusively, and not to any action of a private individual or corporation. It is the state that is prohibited from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law. The state may act through different agencies, through its legislative, executive, or judicial authority. *Virginia v. Rives*, 100 U. S. 313, 316, 25 L. Ed. 667; *Civil Rights Cases*, 109 U. S. 3, 11, 3 Sup. Ct. 18, 27 L. Ed. 835. A municipal corporation may be such an agency. Its power is generally that of a political subdivision of the state created by virtue of the power of the state acting through its legislative department. *Worcester v. Street Ry. Co.*, 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788. *A municipal ordinance passed pursuant to the authority of the state which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the state prohibited by the constitution. But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the state. It must be the act of the state.* *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725, 729, 84 C. C. A. 151. With these fundamental principles before us, let us make further inquiries concerning the ordinance involved in this case.”

The opinion then declares that the franchise granted to the plaintiff by the first ordinance was not exclusive, and that since the later ordinance required the defendant to make compensation to the holder of the former franchise under the former ordinance for any damage

caused by the location of its tracks, it appeared plainly and distinctly, upon the face of the ordinance, that the later ordinance did not in any sense infringe any of plaintiff's rights, and that, therefore, the claim that the plaintiff had been deprived of its property, without due process of law, was wholly unsubstantial and insufficient to warrant the assumption of jurisdiction by the circuit court.

The opinion unquestionably decided:

1. In order that the circuit court may assume jurisdiction where there is no diversity of citizenship, a federal question, *bona fide* and substantial in character, and not a mere claim of words, must be involved;

2. The protection guaranteed by the fourteenth amendment can only be invoked against state action. The act of a municipality may be state action;

3. For a municipal ordinance to be an act of the state, it must be passed pursuant to some state authority, and must, "by implication at least, express the will " of the state";

4. The claim of the plaintiff, in this case, was colorable only, and altogether unsubstantial, and no action by the state was shown.

The rules thus announced and followed are in full accord with the cases which we have cited, and they seem to us to supply full warrant for the judgment rendered. But the court then proceeded as follows:

"But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction

of the circuit court on constitutional grounds. *It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the federal constitution. If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides in Article 1, Section 3, as does the fourteenth amendment to the constitution of the United States, that 'No persons shall be deprived of life, liberty or property without due process of law.'*

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state laws. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the

highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself.' 5 Ency. U. S. Sup. Ct. Rep. page 545.

"This was substantially the question before the Supreme Court of the United States in *Hamilton Gas Light Co. v. Hamilton City*, supra, where the court said:

" 'The jurisdiction of that court (Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff sought protection against the violation of the alleged contract by an ordinance to which the state has not in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.'

"See also *Barney v. City of New York*, 193 U. S. 430.

"It follows from these considerations that the circuit court has no jurisdiction of the case.

"The judgment is therefore reversed with instructions to dismiss the bill of complaint."

In this portion of the opinion, the court said that even if it should be conceded that, in some view of the ordinance and defendant's action under color of its

provisions, there would be a taking of complainant's property without due process of law, it still would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state; that "the supreme law of the state is the constitution of the state," and that the constitution of the State of Washington itself prohibited any deprivation of property without due process of law; that the ordinance was, therefore, not only unauthorized, but was also prohibited by state law, and that the complainant, having its remedy in the state court, must exhaust that remedy before the state could be said to have acted; that until the highest court of the state enforced the ordinance it would not have received the sanction of the state, and would not be state action.

It seems to us that this portion of the opinion, which has been the subject of so much comment, is sufficiently explained by applying it to an ordinance passed *without and not under color* of state authority. Of course, such an ordinance is not state action until it receives the judicial sanction of the highest state tribunal. This interpretation of the opinion is substantiated by an examination of the authorities cited by the court itself. The only citations are the following:

- 5 Encyclopedia U. S. Supreme Ct. Reps.*, 545;
- Hamilton Gaslight Co. v. Hamilton City*, 148 U. S. 258;
- Barney v. New York*, 193 U. S. 430.

The quotation from the Encyclopedia refers only to cases in which not only is there lacking in the state

law any authority for the act of the state agency, but in which such act is by the state law expressly prohibited. The following language, which immediately precedes that quoted by the court, makes this clear:

“When a subordinate officer or agency of the state in violation of the state law undertakes to do that which is not only unauthorized but which is forbidden by the state law, such action cannot be said to be action by the state within the intent and meaning of the fourteenth amendment. In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive or judicial department.”

All the cases cited in the Encyclopedia in support of this principle are cases where either the right violated was not one secured by the federal constitution, or where the action complained of was not only unauthorized, but forbidden by state law. The Hamilton and Barney cases we have already considered and found to be of the latter description.

It seems to us, therefore, that the latter portion of the opinion in the Seattle case was only addressed to a situation in which relief was sought against action not that of the state. If that is so, it is, of course, not authority against our contention in this case. If, on the other hand, it is to be construed as holding that although a municipality acts under color of, or pursuant to, authority granted to it by the constitution of the state, its act may still not be that of the state, we submit that the decisions already referred to by us plainly show that the rule so announced is not the true rule.

PACIFIC GAS AND ELECTRIC CASE.

Counsel for appellants has said that the opinion rendered by the district court in this case "is as forcible a presentation as can be made in favor of the jurisdiction of federal courts in rate cases." We can only add that it, to our minds, so clearly distinguishes the Seattle case from cases of the impression of the one at bar, adheres so closely to the time-honored rules of constitutional law, as we understand them, that it seems to render practically unnecessary the argument we have felt called upon to make. We quote, as follows, from the more important portion of that opinion, which was delivered by Judge Van Fleet:

"That there is some general language in that opinion which, when separated from its context and dissociated from its facts, lends color to the construction put upon it by respondents, cannot be denied, language which has induced a similar view, not only by able counsel seeking, through a petition for rehearing, its modification, but by leading law journals. 23 Green Bag, p. 153; 4 Lawyer and Banker, p. 132."

* * * * *

"These authorities, to my mind, fully sustain the views of this court as expressed at the argument: * * * that, where a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional guaranty here invoked; that such an instance is in all material respects analogous to the one where a state has conferred certain

jurisdiction upon its courts, where acting within the limits of that jurisdiction no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority.”

* * * * *

“It will thus be seen that that case simply holds that an ordinance will not be regarded as state action if it be ‘an ordinance to which the state has not *in any form given or attempted to give* the force of law.’ That as we have seen is not this case.”

Counsel’s only criticism of the rule thus announced is, in effect, to say that he does not agree with it, and to dispute the effectiveness of the authorities referred to in it. To our minds, the reasoning of the opinion, and the cases cited in its support, are unassailable where the general power to fix rates is given.

THE UNITED RAILROADS CASE.

Counsel concedes that there was not in this case “state action.” Facts were alleged in the bill, which showed that the action of the municipality was, at most, a violation of the city’s contract, and of the express paramount law of the state, and that the ordinance was not passed pursuant to any state authority. It necessarily follows, therefore, that there was no action by the state sufficient to sustain federal jurisdiction on the ground that the ordinance was violative of the constitutional provision prohibiting the state from passing any law impairing the obligation of contracts.

We quote, as follows, from the opinion:

“The inquiry is whether on the facts alleged in the bill there has been state action impairing the obligation of the contract.

“(1) A state may act through a municipal corporation to which it has delegated powers of legislation, but where the ordinance of such a corporation is relied upon as constituting the impairment, it must be shown to have been enacted pursuant to the legislative authority of the state. Otherwise it is not state action.

“(2) If, as alleged in the bill, the impairment of the appellee’s contract consists in the fact that the city is proceeding to disregard its covenant, and to construct a road in violation of the provisions of section 499, which was made a part of the contract, we are confronted with the fact that the city is proceeding to violate a law of the state. If its action is illegal and unwarranted, it is primarily so because it violates that law. If its action has the effect to impair the obligation of the contract, it also has the effect to violate the express and paramount law of the state, and it is, therefore, void, and is not state legislation.

“ * * * In line with these authorities is the decision of this court in *Seattle Electric Co. v. Seattle R. & S. Ry. Co.*, 135 Fed. 365, 107 C. C. A. 421. In that case the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law was alleged in the bill to have been granted illegally, and without right and to be ‘without authority in law, and null and void and of no force and effect.’ We held, following the cases above cited, that, taking those averments to be true, the ordinance complained of was not the act of the state, and that there was no federal question involved. When it comes to the question whether the ordinance of a municipality is or is not legislation by the state, there can be no dif-

ference between an ordinance which has been enacted ultra vires and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of a federal court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellee relies upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

In a concurring opinion, Judge Hanford said:

"I concur in the foregoing opinion and all of it with this reservation, that as the decision of this court in the case of *Seattle Electric Co. v. Seattle R. & S. Ry. Co.*, 185 Fed. 365, 107 C. C. A. 421, is cited, I am unwilling to acquiesce in that part of said decision found in the quotation from 5 Ency. U. S. Sup. Ct. Rep. p. 545, asserting that a party complaining of an invasion of rights guaranteed by the constitution of the United States and also in violation of the constitution or laws of the state, 'must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort' before he will be entitled to invoke the jurisdiction of a federal court.

"The federal courts ordained and established pursuant to the constitution of the United States have an important function in adjudicating controversies involving questions of national law, and the jurisdiction of the United States Circuit Courts in actions at law and suits in equity, if not exclusive, is concurrent with, and not secondary to, the

jurisdiction of state courts. I consider that a United States court has no right to deny its jurisdiction, in a case where jurisdiction is conferred by Congress, merely because of a presumption that the rights of the complainant will be fully protected by a state court, or on a review of its decision by the Supreme Court of the United States."

Counsel refers, with emphasis, to that portion of the decision which says that

"there can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance."

To our mind, this is a correct statement; but we see nothing in it which militates against our position. The rule thus stated is, we believe, precisely the rule in support of which we have at all times in this argument been contending. By *ultra vires* act, in this connection, is meant, we submit, an act by a state agency, not done under color of, or upon an assumption of, or pursuant to, state authority. The act considered by this court, in the above case, was an act of that nature.

THE HOME TELEPHONE CASE.

We shall not discuss the opinion of the district court, rendered in this action. It is confessedly based on the decision of this court, delivered in the Seattle case, and, to our minds, misconstrues and misinterprets the rule there laid down.

In our opinion, then, the cases, with the single exception of the one last mentioned, follow the rule long ago announced by the Supreme Court of the United States, followed by it to the present time, and repeatedly applied in the manner we have suggested, by all other federal courts in which the question has arisen.

Upon the basis of those decisions, we believe this rule to be the following: Where the state has given, or attempted to give, to a legislative act, to be performed by one of its agencies, the force of a law, that act is regarded, in legal contemplation, as having been performed under and pursuant to the power conferred, and is considered the act of the state, notwithstanding its repugnancy to the national or state constitution. If the state has “in any form given, or attempted to give, “the force of law” to an ordinance, if it was passed “under supposed legislative authority”; if the “determination of its reasonableness was left to the discretion” of the agency which enacted it; if the agency acts in excess of its powers, but not in violation of them; if the ordinance is passed “under the power conferred” or under delegated legislative authority; if the ordinance is “a valid enactment except for its repugnancy to the constitution”; if a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretion and the function is performed,—in all such cases it has been judicially determined that the state has acted, and that the act performed is state action, within the meaning of the fourteenth amendment.

The principle, in other words, is that where an agency of the state has been given power to act with regard to a certain subject matter, its action with regard to that subject matter is authorized, even though repugnant to the provisions of the state and federal constitutions; it is acting under color of, upon an assumption of, pursuant to, authority granted by the state, and its act is that of the state.

The authorities cited so firmly establish the rule that we are reluctant to carry our argument further. One other observation may, however, properly be made. Appellant's argument is that because a provision similar to that of the fourteenth amendment has been made a part of the California constitution, federal courts are ousted of the jurisdiction they would otherwise have. It is conceded that in states which have no such constitutional provision, federal courts have jurisdiction in just such cases as this, but it is insisted that because that guaranty has become a part of the organic law of the state, the federal courts are for that reason, and for that reason alone, deprived of their former power. It is apparent that this cannot be so. The insertion of the provision under consideration in the California constitution had absolutely no effect upon the law of California. The constitution of the United States is the supreme law of the land; its provisions are explicitly said to be the supreme law of California in our constitution, and the California court must necessarily follow its mandates, regardless of the state law. If the rule is and has been that contended for by counsel, it necessarily follows that even in states where there is no

such constitutional guaranty as that contained in the fourteenth amendment, the federal courts still have no jurisdiction, because, *under the state law*, into which the federal constitution must be read, the act complained of is prohibited. But that that is not the law is, of course, fully sustained by a long line of authorities in which that jurisdiction has been upheld.

On counsel's theory we should have two situations in two different states, in all respects the same, yet in one the federal courts would have, and in the other they would not have, jurisdiction. The explanation is that counsel's rule is not the true rule, and that he has failed to appreciate what state action, within the meaning of the fourteenth amendment, is. It is not action by the state which is legally unassailable, nor is it only action which has had the approval of the highest court of the state. It is not the former, because, if it were, a federal court would in each case have to determine the constitutional question against complainant as a prerequisite to taking jurisdiction. It is not the latter, for, in almost every case, the power delegated fails to require, for its valid exercise, the approval of the courts. There have been delegations where judicial approval is, in terms, made a part of the legislative act.

Virginia v. Reeves, 100 U. S. 313.

But ours is not such a case.

There is, we suppose it will be conceded, in the constitutional grant under present consideration, no pretense of requiring judicial sanction for the valid exercise of the authority bestowed, and the exercise

of the grant may be valid, we submit, without any such sanction. If such sanction were necessary, an otherwise legal ordinance, fixing water rates, would not be effective until the Supreme Court of the State of California had approved it. There is plainly no such requirement.

It is, of course, unnecessary for us to call the attention of this court to the opinions of the Supreme Court of California holding that the board of supervisors of the City and County of San Francisco is not only the only agency of the state which can fix rates to be charged for water by that municipality, but also that upon it is imposed the duty of so doing, and that for a failure to perform that duty the individual members of it may be removed from office.

State action is rather, as we have said, the performance by an agency of the state of an act to which the state has attempted to give the force of a law, and which is performed, under color of, and pursuant to, state authority.

It is respectfully submitted that the order appealed from should be affirmed.

EDWARD J. McCUTCHEN,

A. CRAWFORD GREENE,

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Solicitors for Appellee.

7
No. 2176.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

**The City and County of San Francisco, a municipal corporation,
et al.,**

Appellants,

vs.

**Spring Valley Water Company, a
corporation,**

Appellee.

Brief of John W. Shenk, City Attorney of the City of Los Angeles, and George E. Cryer, Assistant City Attorney of the City of Los Angeles, Amici Curiae, in Support of the Contention of Appellants.

INTRODUCTORY STATEMENT.

Appellee, a California corporation, has filed in the United States District Court, a bill charging that the city and county of San Francisco, a municipal corporation of said state of California, has passed and intends to enforce an ordinance fixing rates to be charged and collected by appellee for water supplied to the inhabitants of the said city and county of San Francisco; that

the rates so fixed are arbitrary and unreasonable and that their enforcement would operate to deprive complainant of its property without due process of law in violation of the Constitution of the United States. It is claimed that these allegations disclose a case involving a federal question under the Fourteenth Amendment and operate to confer jurisdiction on the federal courts, even though there is no diversity of citizenship.

This claim was challenged in the court below, on the ground that the Constitution of the state of California provides that no person shall be deprived of property without due process of law; that by reason of such provision of the State Constitution, the board of supervisors of defendant municipality had no authority from the state to pass an ordinance of such character as the one in question is charged to be; that if the ordinance is confiscatory, it is void under state law; that for that reason the bill does not disclose a controversy, the result of which depends upon the Federal Constitution or laws.

The learned District Court overruled the contention of defendant, retained the case and issued the temporary injunction from which this appeal is taken. The correctness of the order of the District Court upholding the claim of federal jurisdiction presents the question to be considered on this appeal.

The undersigned, John W. Shenk, city attorney of the city of Los Angeles, and George E. Cryer, assistant city attorney of the city of Los Angeles, having been granted permission to file a brief herein, as friends of the court, respectfully submit that the learned District

Court erred in retaining this case and in issuing the injunctive order appealed from. We submit that this record does not present a case for federal jurisdiction, and for the following reasons:

BRIEF OF ARGUMENT.

I.

The Fourteenth Amendment is Directed Against Action by the States.

The Fourteenth Amendment is aimed at state action. It is not directed against persons, against cities or against bodies public or private other than states. It is much less comprehensive in that respect than the guarantee of due process to be found in the State Constitution.

To maintain its claim to federal jurisdiction, therefore, appellee must show that the *state of California* has taken action which will operate to deprive it of its property without due process of law or that the *state of California* denies to it the equal protection of the law. But we contend that:

II.

The State of California Has Taken No Action.

Has the state of California deprived appellee of its property without due process of law or denied to it the equal protection of the law? No action has been taken by the state government, or in the name of the state or in behalf of the state, or by any officer of the state government. It is not claimed that the state has acted except through the alleged instrumentality of an agent.

Officers of the city and county of San Francisco, a separate and subordinate subdivision of the state of California, have enacted a certain ordinance which the bill alleges would operate to deprive complainant of its property without due process of law. The state of California, however, by a plain and unambiguous provision of its Constitution, advises complainant, a citizen of the state of California, that its property may not be taken without due process of law, and tells complainant, in effect, that if the charge is true that the ordinance of the city and county of San Francisco is confiscatory, then that ordinance is null, void and of no effect, and directly violates the mandate directed by the people of the state not only to every officer of the state, but to every agency, public or private, operating within the state. In the face of this declaration by the state—in the face of this limitation upon the authority of every agent of the state, plainly and publicly expressed and known to complainant, it nevertheless comes into the federal forum and charges *the state* with the alleged confiscatory act. This too, without any appeal to the principal and without any act of alleged ratification on the part of the principal.

When did it become the law that known limitations upon an agent's authority no longer operate to protect the principal? Is it a tenable legal proposition that an act beyond the known limits of an agent's authority, not confirmed or ratified by the principal is nevertheless the act of the principal?

Is it true that the act of an agent, merely in the exercise of an agency, is the act of the principal, regardless of limitations upon the agent's authority?

Complainant's entire case, in support of federal jurisdiction herein, rests upon an affirmative answer to the last question. In taking this position we contend that appellee has fallen into error. We submit that *limitations on an agent's authority* are still operative and that no action by the state of California is shown by this record. Let us first examine this matter on principle.

We contend that:

- (a) THE CITY AND COUNTY OF SAN FRANCISCO IS AN AGENT OF THE STATE OF CALIFORNIA WITH LIMITED POWERS, WHICH DO NOT INCLUDE AUTHORITY TO PASS OR ENFORCE A CONFISCATORY RATE ORDINANCE.

The Constitution of the state of California provides (Art. I, Sec. 13):

“No person shall be deprived of * * * property without due process of law.”

This constitutional provision must be read in connection with any act conferring authority to fix rates, and constitutes a limitation on such authority.

If, therefore, the ordinance attacked in this action is confiscatory, it is not authorized by the state. On the contrary it is in direct violation of the organic act of the state.

It would seem too obvious to require argument that this constitutional provision is a limitation upon confiscatory action within the state, at least as extensive in scope as is the Fourteenth Amendment. The Fourteenth Amendment guarantees that the state shall not confiscate. The state guarantees that neither the state

nor any other agency whatever shall confiscate within its borders.

(b) ACTION BY THE CITY AND COUNTY OF SAN FRANCISCO IN THE EXERCISE OF A STATE AGENCY, BUT NOT WITHIN THE LIMITS OF ITS AUTHORITY FROM THE STATE, IS NOT STATE ACTION.

It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent's authority measures the principal's responsibility.

But what elements enter into the question of authority and what determines the "scope of an agency"?

It is calmly assumed by those who argue in support of federal jurisdiction that an act, *merely in the exercise of an agency*, is the act of the principal *regardless of known limitations* upon the extent to which such exercise of agency is authorized to be carried. It is calmly assumed that because the municipality is given certain authority in the field of public utility rate fixing any act it may assume to perform *in that field* is the act of the state.

Is this assumption warranted by the law? We are told in the course of the opinion of the Supreme Court of the United States in *Mechanics Bank of Alexandria v. Bank of Columbia*, 18 U. S. (5 Wheat.) 326, that:

"The liability of the principal depends upon the facts: 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated."

This is the invariable rule as between principal and agent and as between principal and all persons having knowledge of the limitations upon the agent's authority.

In private business transactions the scope of the agent's authority is sometimes held to be broader than the authority actually conferred, *as to persons having no knowledge of limitations upon the agent's authority*. Upon principles of estoppel an "ostensible agency" is said to arise, the extent of which agency as measured by the powers with which the principal has apparently clothed the agent.

But the principles of ostensible agency have no application to a public agent. The powers of such agent are defined by law of which all persons are deemed to have knowledge, hence the authority actually conferred always determines the scope of such agency. On principle it would seem, therefore, that the city and county of San Francisco is the agent of the state of California with authority to fix rates, subject to the limitation that it shall not fix a confiscatory rate; that the act of the city, done (1) *in the exercise*, and (2) *within the limits* of its authority would be the act of the state. But that if, as alleged, the municipality has passed a confiscatory rate ordinance, it has performed an act in the *exercise* of its agency but *not within the limits* of its authority.

Those who contend for federal jurisdiction in cases such as this admit that if a city has not been authorized to fix rates its assumption of authority to pass a rate ordinance will not make such act the act of the state. No criticism is offered upon such cases as *Louisville v. Telephone Company*, 155 Fed. 725, where federal jurisdiction was denied on the ground that the defendant

city of Louisville had not been ganted authority to fix rates, hence its act, in assuming to pass a rate ordinance, could not be charged to the state of Kentucky and was not state action. Then why should the courts be asked to ignore the other equally important element entering into the question of the agent's authority—*limitations* upon the extent of delegated powers? Appellee would scarcely deny that, if its allegation is true that the rate ordinance enacted by the board of supervisors of the city and county of San Francisco is confiscatory, it is void under the state law. Why is it void under the state law? Because it is in excess of the authority of the city.

The vice in the entire argument for appellee—the essential weakness in the argument for federal jurisdiction lies either in the assumption that the state of California has delegated to its municipality *unlimited authority* in the matter of rate fixing or that limitations upon an agent's delegated authority are of no consequence in determining the responsibility of the principal.

The former alternative position could scarcely be maintained. When appellee asserts that the rate ordinance in question is confiscatory, it has but to turn to the Constitution of the state of California to learn that it is just such ordinances that the city and county of San Francisco is forbidden to enforce.

The state of California has not vested its municipalities with "full and plenary power" to fix rates as seems to have been assumed by the learned District Court of the Northern District of California as indicated in the course of the opinion in *San Francisco Gas & Electric*

Co. v. City and County of San Francisco *et al.*, 189 Fed. 943. If it has, what is the purpose of the state constitutional limitation referred to above? And by what authority do state courts annul under the State Constitution, the confiscatory acts of such rate fixing bodies? Does the state authorize an act which its Constitution prohibits and makes void? We assert with confidence the contrary. We assert with equal confidence that no municipality of the state of California has authority to enact or to enforce a confiscatory rate ordinance. We would not be understood as contending, however, that wide discretionary power may not be conferred upon state agents nor would we suggest that with unlimited discretionary power the agent's act would be void, merely because its discretion was unwisely or improperly exercised. What we do contend is that *limits may be fixed* beyond which an exercise of discretionary power may not extend. When limits are fixed the scope of the agency is the field thus fixed and limited.

The board of supervisors has certain discretion in the matter of rate fixing.

It may perhaps be said that the board has "full and plenary power" to fix rates *within the limits fixed by the Constitution*. It may fix a high rate or a lower rate but it may not fix a confiscatory rate. If the allegations of the bill are to be taken as true, complainant knows, the court knows and defendants know that the board of supervisors have *assumed* an authority which they do not possess—that they have adopted an ordinance which is null and void under the law of the state, re-

gardless of the Fourteenth Amendment. Do federal courts take jurisdiction to declare null, ordinances which are void under state law?

We submit that according to elementary principles of the law of agency, the act of the city and county of San Francisco done *in the exercise* of its agency but *not within the limits of its authority* is not the act of the state of California.

Having considered on principle the effect of the municipality's want of authority on the question of federal jurisdiction, we may next inquire how stands the matter upon authorities dealing specifically with this question of jurisdiction. This brings us to the consideration of our third point.

III.

An Unauthorized Act of a State Agent is Not, Under the Authorities, State Action, Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

Seattle Electric Company v. Seattle R. & S. Ry. Co. (C. C. A.), 185 Fed. 365;

City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.), 190 Fed. 507;

Huntington v. City of New York, 118 Fed. 683 (affirmed 193 U. S. 440);

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725;

Barney v. New York, 193 U. S. 430;

Hamilton Gas Light Company v. Hamilton, 146 U. S. 258;

Memphis v. Cumberland Tel. Co., 218 U. S. 624;

Virginia v. Rives, 103 U. S. 313.

We think that the decisions of federal courts fully warrant the above conclusion.

While the courts have not always discussed or made clear the principle underlying their decisions they have quite consistently held that an *unauthorized act* of a state agent is not within the inhibition against state action, contained in the Fourteenth Amendment to the Constitution. The fact that the courts most frequently have had to consider cases where an alleged state agent had performed an *ultra vires* act—where the agent had assumed to do an act on behalf of the state which was not “an exercise” of any delegated authority, by no means warrants the conclusion that the other element—action *within the limits* of delegated authority—may be ignored.

In the course of the opinion in the case of *Huntington v. City of New York*, 118 Fed. 683, it is said:

“The inhibition of the Fourteenth Amendment is against action by a state depriving an individual of his property. * * * A state acts by agents and the inhibition runs against all who are in fact such agents, *acting within the scope of an authority* conferred upon them by the state.” (Italics ours.)

Continuing, the learned court says:

“Now, in the case at bar, the first question to be considered, is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing.

It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to the conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit."

Referring to the facts involved in the case at bar we find that the state of California has authorized the city and county of San Francisco to fix rates to be charged by public utility corporations for service rendered to its citizens, but *subject to* this important *qualification* that *said city shall fix no confiscatory rate*. May it not be said in this case, as it was said in substance, in *Huntington v. New York*: When the city departs from its instructions, and fixes a confiscatory rate, whatever trespass upon private rights it may commit is one which the state has not only not authorized it to commit, but under any fair interpretation of the law, has forbidden it to commit.

No one would deny that if the ordinance is confiscatory, it is void under the State Constitution. Why is it void? Simply because it is unauthorized and contrary to the supreme law of the state.

The decision in *Huntington v. New York* was affirmed by the Supreme Court (193 U. S. 440) upon the

opinion in *Barney v. New York*, 193 U. S. 430, a case which involved the same facts.

In the course of its opinion in *Barney v. New York*, *supra*, affirming the decision of the Circuit Court, this court said:

“Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.

“Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant’s grievance was that the law of the state had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. *Missouri v. Dockery*, 191 U. S. 165, *ante*, 133, 24 Sup. Ct. Rep. 53; *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. Rep. 18; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667.”

(48 L. Ed. 740.)

In the case at bar we submit that “it is for the state courts to remedy the act” of the city and county of San Francisco “done without authority of, and contrary to the state law.”

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725, was a proceeding in equity to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of

Louisville, on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive complainants of their property without due process of law guaranteed by the Fourteenth Amendment. The learned court, after quoting certain allegations of the bill to the effect that the defendant city had not been given authority by the Constitution and statutes of Kentucky to pass the ordinance in question, said:

“If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the force and effect of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises.”

(155 Fed. 729.)

Note that the court observes, in that part of its opinion quoted above, that “to be given the force and effect of a law of the state, it (a city ordinance) must have been enacted in the exercise of some legislative power conferred,” etc. If a city ordinance must have “*the force and effect of a law of the state*” in order that it may be considered state action, surely an ordinance in direct violation of the State Constitution is not state action, for it has no force or effect whatever.

The bill, in the last above entitled cause, having alleged that the state had not delegated authority to the city to legislate upon the subject of rates, the court very

properly pointed out that, if such allegation were true, the ordinance attacked had not been passed “in the exercise” of a power conferred by the state, hence the ordinance was not chargeable to the principal—the state, and was not “state action.” That was as far as the learned court was required to go in disposing of that case. But as we have already suggested, in order that an act of an alleged agent may be deemed the act of the principal, the agent must have acted “within the limits of his authority,” as well as “in the exercise of his agency.”

In the case at bar the city was given authority to legislate upon the matter of rates, subject to the limitation that it must not fix an unreasonable rate. If, with such limitation upon its authority, the board of supervisors of the municipality did, as appears from this bill, arbitrarily and without investigation fix an unreasonable confiscatory rate, how can it be said that the act of the municipality was within the limits of its authority and was the act of the state?

The learned Circuit Court of Appeals, in its opinion in the Cumberland case, *supra*, said:

“There was no state authority behind the action of the Louisville common council,”

hence its action was not state action. May it be said that there is any *state authority* behind the action of the board of supervisors of the city and county of San Francisco, if that action was in direct violation of the supreme law of the state? Does the state authorize an act which its Constitution prohibits and makes void?

“There can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law.”

City and County of S. F. v. United R. R. of S. F.
(C. C. A.), 190 Fed. 507.

And there can be no difference in principle between an ordinance enacted in violation of a general statute of the state and an ordinance enacted in violation of the supreme law of the state, the Constitution. How may a state be said to deprive its citizen of his property without due process of law, when the alleged act of deprivation is confessedly made void by the supreme law of the state, and its courts are open to him to have the act so adjudged? It is said by Judge Cooley (Const. Limitations, 7th Ed., pp. 259, 260):

“When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is also true as to any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.”

The very allegations of fact that complainant must make in order to state a case for relief under the Fourteenth Amendment establish, if true, the conclusion that

the ordinance was unauthorized by the state and that it is absolutely void under the state law. Is a citizen of a state justified in going, or may he be permitted to go to the courts of the United States complaining that *his state* is attempting to deprive him of his property without due process of law, when he confesses that, if the matters and things involved in his complaint are true, the law of his state makes the act of alleged deprivation null and void and of no effect? We think not.

In the comparatively recent case of *Memphis v. Cumberland Telephone Company*, 218 U. S. 624, the Supreme Court had under consideration the question of federal jurisdiction to grant relief from an alleged confiscatory rate ordinance passed by the city of Memphis. In the course of its opinion, declaring against the existence of federal jurisdiction, the court reviews and approves many of the above cited decisions. Speaking by Mr. Justice Day, the court says:

“It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the Fourteenth Amendment. It is hardly necessary to say that that amendment is aimed at state action, in the provision that no state shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the Fourteenth Amendment by an authorized action of the state, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of federal jurisdic-

tion has been repeatedly held in this court. *Hamilton Gas Light Company v. Hamilton*, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: 'A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States.'

"In *Barney v. City of New York*, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the state, hence the action did not invoke the protection of the Fourteenth Amendment because of action by the state of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

"A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the Constitution and laws of the United States. This was held to be so because of other statements of the bill,

which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the state of Kentucky to the municipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

“The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

“So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the State Constitution, which, as well as the Federal Constitution, inhibits attempts to take property without due process of law.”

An attempt may be made to distinguish the cases upon which appellant relies on the ground that *the allegations of the bill* in these cases showed a want of state authority for the act in question, while in the case at bar, the bill alleges that the act was done by authority of the state. As we view the matter, however, *this record*, consisting of the bill and the affidavits before the court on the application for an injunction, shows that the city and county of San Francisco had

power to fix utility rates, subject to the limitation that it should not fix a rate that would operate to deprive any person of property without due process of law.

Expressed differently, we think it sufficiently appears *from this record*, as it is stated to have been averred in the bill considered in *Louisville v. Cumberland Tel. Co.*, 155 Fed. 725, that:

“Defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate plaintiff’s property and thus it would be deprived thereof by the city without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.”

When *the record shows* that the city and county of San Francisco had no authority from the state to fix other than reasonable rates, but that it nevertheless proceeded to fix an unreasonable confiscatory rate, action in excess of state authority is shown. Our authorities, therefore, apply.

In his review of the authorities, in the course of his opinion in the case of the Home Telephone & Telegraph Company v. The City of Los Angeles *et al.*, District Judge Wellborn made the timely observation that no case had been cited where the Supreme Court of the United States had held that an ordinance of a city manifestly in violation of the State Constitution, is action by the state. We know of no decision of the Supreme

Court to that effect. We do not anticipate that there will be any such decision until that court is prepared to affirm that the unauthorized act of an agent is the act of the principal and that a state deprives its citizen of his property by an act of a state agent which never had any validity under the state law.

IV.

The Result of this Suit Does Not Depend Upon the Effect or Construction of the Fourteenth Amendment, Hence the Suit is Not One Arising Under the Constitution or Laws of the United States.

Recent decisions indicate that the claim of federal jurisdiction herein should fail for the above stated reason.

Memphis v. Cumberland Tel. & Tel. Co., *supra*;
Seattle Electric Company v. Seattle R. & S. Ry.
Co., *supra*;

City and County of San Francisco v. United R.
R. Co. of S. F., *supra*.

In Memphis v. Cumberland Telephone & Telegraph Co., *supra*, an action involving telephone rates in the city of Memphis, it was alleged in the bill that the ordinance was passed without authority of the state and that its attempted passage was an abuse of power by the city, and the Supreme Court said:

“We said by the chief justice, in Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239: ‘When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, *upon the determination of which the result depends*, it is not a suit arising under the Constitution or laws.’”

Under the allegations of the bill and of the plea, the determination of the case at bar does not depend upon the construction of the Fourteenth Amendment to the Constitution of the United States. The complainant has alleged that the ordinance is confiscatory. If that be so it was passed contrary to the mandate of the state, contrary to the law of the state and is not the action of the state.

If the Fourteenth Amendment had never been passed *the result of this suit should be exactly the same*. If the ordinance attacked is confiscatory it is void, regardless of the Fourteenth Amendment. *This suit does not, therefore, involve a controversy, the result of which depends, in any degree, upon the effect of the Fourteenth Amendment or upon the effect of any other law of the United States.*

Seattle Electric Company v. Seattle R. & S. Ry. Co. (C. C. A.), 185 Fed. 365, and City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.), 190 Fed. 507, declare in substance, that no question involving the effect or construction of the Fourteenth Amendment arises where the State Constitution contains a similar provision.

This court will recall that in the Seattle case, *supra*, speaking by Judge Morrow, it said:

“But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of

provisions of the Federal Constitution. If it should be conceded that in some view of the ordinance and defendant's action, under color of its provisions, there would be a taking of complainant's property without due process of law, still it would not follow that the Circuit Court had jurisdiction of the case unless the ordinance in that respect would be the supreme law of the state. The supreme law of the state is the Constitution of the state; and that document provides in article I, section 3, as does the Fourteenth Amendment to the Constitution of the United States, that: 'No persons shall be deprived of life, liberty or property without due process of law.'

"Under this provision of the State Constitution the ordinance would be as invalid as under the Federal Constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts in Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on a writ of error to the United States Supreme Court upon the ground, not that the proceeding or action

complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the Fourteenth Amendment has at last received the sanction of the state and, in effect, become the act of the state itself.' ”

In the later case of City and County of San Francisco v. United R. R. Co. of S. F., *supra*, the doctrine of the Seattle case was expressly reaffirmed.

We repeat that this case does not present a controversy, the result of which depends in any degree, upon the Fourteenth Amendment to the Constitution of the United States; that if said amendment had never been adopted the result of this suit should be exactly the same. For that reason, and on the above authorities, there is no federal jurisdiction of the cause.

Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principal; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States.

V.

Appellee's Arguments and Authorities Considered.

Since preparing the above statement of the argument against the existence of federal jurisdiction in this class of cases, we have been favored with copies of the briefs on behalf of the respective parties to this case and have listened to the oral arguments submitted to the court in support of their respective contentions.

The essential point of difference between our position and that of the appellee may be stated in a very few words.

We contend that in order that the act of the municipality may be deemed to be the act of the state, such act must be authorized by the state—that is to say, the act must be done (1) in the exercise of an agency, and (2) within the limits of the authority delegated, while appellee contends that an act by a municipality, merely in the exercise of an agency, is to be deemed to be the act of the state. Or, as counsel sometimes prefer to express it, if an act was done under mere “color of authority,” “if the agency acts in excess of its powers, but not in violation of them; * * * if the ordinance is a valid enactment except for its repugnancy to the Constitution, * * * in all such cases it has been judicially determined that the state has acted, and that the act performed is state action, within the meaning of the Fourteenth Amendment.”

Appellant argues that the act of the agent must be authorized or it is not the act of the principal. Appellee contends that “color of authority” for the act makes it the act of the state.

Appellant argues the case on principle, supplemented by authority—appellee wholly from the standpoint of authority. Appellant contends that the cause is to be determined by an application of principles of agency; that an unauthorized act of a municipality is not the act of the state. Appellee admits that a “wholly unauthorized” act of a city is not the act of the state, but claims that an act done “under supposed legislative authority” is state action.

It is said that if an “ordinance is a valid enactment except for its repugnancy to the Constitution” it is state action according to the authorities. (Appellee’s brief, p. 54.)

These contentions of appellee are surely worthy of examination.

If, in the face of an admission that an unauthorized act of a municipality is not the act of the state, it is still true that an ordinance of a city is the act of the state, though invalid because repugnant to the State Constitution, there must be some reason for such conclusion. Appellee does not attempt to justify its assertion except by the declaration that the authorities so hold.

Do the authorities so hold?

We have neither the time nor the inclination to review all of the cases cited by counsel. In many of the cases cited the court was considering an entirely different matter from that presented by this record.

For instance, at pages 32 and 33 of its brief, appellee directs attention to the case of *City Street Ry. Co. v. Citizens Street R. Co.*, 166 U. S. 561, 41 L. Ed. 1116, and says:

“The action had here been brought upon the ground that defendant had attempted, by the passage of a municipal ordinance, to impair the obligation of a contract entered into with complainant by it. In the lower court, the point now so strenuously urged was directly raised and considered.”

Then follows a quotation from the opinion of the Circuit Court when the case was under consideration below.

An examination of the opinion indicates that counsel are in error when they assert that “the point now so strenuously urged was directly raised and considered.” It nowhere appears that the *State Constitution* of Indiana contained a provision prohibiting the passage of any law impairing the obligation of contracts, or that by reason of the existence of such state constitutional provision, the city of Indianapolis had performed an act that was unauthorized. The quotation presented by appellee in its brief (p. 32) shows clearly that the claim was that the provision of the *Constitution of the United States* (Art. I, Sec. 10) should be read into the state statute conferring power upon the city. *This is an entirely different proposition.* It never has been claimed that the action of the city and county of San Francisco was unauthorized merely *because it violated law*, or because it violated the supreme law of the land—the Federal Constitution. The claim has been that it was not the act of the state *because it violated the State Constitution*, and hence was not authorized by the state.

The city is not the agent of the federal government.

It is the agent of the state. The State Constitution is in the nature of a general order to state agents.

The state may authorize its agents to take action which violates the supreme law of the land, just as any other principal may instruct his agent to perform an act which invades the legal rights of others, thereby violating the law and rendering the principal liable.

No one would contend that the law of the state should be read into and become a part of a private principal's instructions to his agent, thereby limiting the powers of the agent. If that were true no agent could ever violate the legal rights of another person by authority of his principal. "The bane and the antidote would go together."

Neither the city of Indianapolis nor the city and county of San Francisco is an agent of the government of the United States. One is an agent of the state of Indiana, the other of the state of California. Their powers, as state agents, are to be found in the Constitutions and laws of their respective states. Both are, of course, subject to the supreme law of the land—the Federal Constitution, and wherever that supreme law operates directly against persons or cities they may take action which will violate that law. Since the Fourteenth Amendment is directed against their principal—the state—they may, when properly authorized by the state, take action which shall operate to charge their principal with a violation of that amendment. But when, in any other capacity than as authorized agents of the state, they take action which operates to deprive any person of property without due process of law,

they do not violate the Fourteenth Amendment, for they are not states. They would, however, violate a constitutional provision declaring that no person shall be deprived of property without due process of law.

We entirely agree with the conclusion reached by the court in *City Street Ry. Co. v. Citizens St. Ry. Co.*, *supra*. We entirely agree with the statement of law quoted on page 32 of appellee's brief. Neither the case nor the statement quoted, however, lend any support whatever to appellee's contention in this case. On the contrary, insofar as the case may be regarded as authority on the question here in issue, *it supports the contention of appellant*. Note again the language of the court as quoted by appellee in its brief:

"If the law of the state, or a *municipal grant* under its authority, is a *valid enactment*, except for its repugnancy to the provision of the Constitution *which prohibits a state* from passing any law impairing the obligation of contracts, then *such repugnancy* presents a federal question, and gives this court jurisdiction."

Note the statement of the court—"if the municipal grant" under state authority "is a *valid enactment*, except for its repugnancy to the provision of the Constitution which prohibits a state from passing any law impairing the obligation of contracts." Is that case authority for the statement that a municipal ordinance, *invalid* because repugnant to the State Constitution, is the act of the state?

Note the peculiar position into which appellee is forced in its efforts to support the proposition that an ordinance which is null and void under the state law

is nevertheless the act of the state. Note how appellee would avoid the force of such decisions as *Memphis v. Cumberland Tel. & Tel. Co.*, 218 U. S. 624; *Louisville v. Cumberland Tel. & Tel. Co.*, 155 Fed. 725, and cases of that type:

Counsel say (brief, pp. 21-22):

“We concede that the state has not acted when individuals, even though they may be state officials, violate property rights, where there is no law of the state which even purports to confer upon them the authority to so act. Redress in such cases must be had in the courts of the state.”

We infer, then, that it is not claimed to be literally true, as stated in the *Raymond* case, that “whoever by virtue of public position under a state government deprives another,” etc., violates the Fourteenth Amendment. Continuing, counsel say:

“The very large proportion of those cases in which litigants were forced to seek their remedy in the state courts were those in which municipal ordinances were attacked on the ground that they were wholly unauthorized by the state, the legislative body of the municipality having no power under the state law to pass any ordinance whatever of the kind in question. If there was this lack of power, there was not state action and no federal question was presented.”

We infer from the above that counsel attach special significance to the word “wholly” in the phrase “*wholly* unauthorized,” and that they regard it as an important circumstance whether the municipality did or did not have power to pass any ordinance *whatever* of the kind in question. Do counsel mean to imply that there is a sort of “twilight zone,” in which the act of the city,

unauthorized but not *wholly* unauthorized is nevertheless the act of the state? Do counsel contend that an ordinance of a city which is in excess of the city's powers and void, because repugnant to the State Constitution, is the act of the state, merely because the city had authority under which it *might have passed a valid ordinance?*

We contend that there is no such twilight zone as appellee has indicated. If the act is in excess of the public agent's authority it is not the act of the principal. We repeat that the "scope of an agency" is the authority actually conferred, where knowledge of that authority is shown, and that in the case of a public agent, with powers defined by law, the authority actually conferred is the scope of the authority.

Because, in the course of some of the opinions, will be found statements to the effect that—"an ordinance not passed under supposed legislative authority, cannot be regarded as a law of the state" (Hamilton Gas Light Co. v. Hamilton, *supra*), by no means justifies the assertion that the authorities hold that an ordinance *passed* under supposed legislative authority is the act of the state.

Because the municipality has "claimed" or "assumed" to have authority to pass and enforce the ordinance in question, is not sufficient to make the ordinance the act of the state.

Louisville v. Cumberland Tel. & Tel. Co., *supra*.

We think that of the other cases cited by appellee in support of its contention, but four are sufficiently in point to merit further consideration in this hasty review.

The cases referred to are:

Raymond v. Chicago U. T. Co., 207 U. S. 20;
Des Moines City Ry. Co. v. City of Des Moines,
151 Fed. 854;
Ozark Bell Tel. Co. v. City of Springfield, 140
Fed. 666;
Capital City Gas Co. v. City of Des Moines, 72
Fed. 818.

Taking up first the case last cited, we find a decision by the Circuit Court of the Southern District of Iowa *apparently* sustaining in part the contention of appellee.

We say “apparently” sustaining the contention of appellee. The conclusion reached by the court was that federal jurisdiction existed and that the case should be retained.

(See extended quotation from the opinion at pp. 39-40-41 of appellee’s brief.) It will be observed that the learned court makes no attempt to meet the argument against federal jurisdiction. Like appellee in the case at bar, the learned court relies wholly upon what it deems to be authoritative decisions.

Here is the learned court’s answer to the argument of defendant:

“The test which shall determine the correctness of this reasoning is not of difficult application. Had the law making power of the state by statute fixed the rates, and such rates were not reasonable,—and by the term ‘not reasonable’ rate as I am herein using it is meant a rate so low as not to afford a proper and reasonable return, under the circumstances, for service performed, including gas furnished,—if the statute rates were not reasonable, manifestly the law might be decreed in-

valid, under the doctrine so clearly announced by Justice Brewer in *Ames v. Railway Co.*, 64 Fed. 165."

Turning to the case cited and relied upon (*Ames v. Railway Co.*, 64 Fed. 165), we find an action *by non-residents* of the state of Nebraska seeking to enjoin the enforcement of railway freight rates fixed by the legislature of Nebraska and alleged to be unreasonable and confiscatory. The Constitution of Nebraska provided (see 64 Fed. 176):

"And the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads in this state."

With diverse citizenship no federal question was necessary. All that was determined by the court was that the legislature had no power under the State Constitution to fix unreasonable rates; that whether the rates attempted to be fixed were unreasonable and confiscatory was a judicial question; that a state could not, as against citizens of another state, reserve these questions to the determination of its own courts; that if the legislature fixed unreasonable rates they would be declared null.

The discussion in *Ames v. Railway* is absolutely foreign to the matter under consideration in *Capital City Gas Co. v. City of Des Moines*. No question of *state action*, within the meaning of the Fourteenth Amendment, was involved.

Complainants, being non-residents, had a right to, and did attack the rates in the federal court, just as a

citizen of Nebraska might have attacked them in the state courts. Having reached the conclusion from the Ames case that rates fixed by the legislature might be successfully attacked in the federal courts, the learned court states that it surely must be true that when the legislature delegates to a municipality the power to fix rates, the rates fixed by such municipality must also be open to judicial investigation.

This is manifestly true provided the investigation is sought in the proper court, but it affords no answer whatever to the argument that unauthorized action is not state action so as to confer jurisdiction under the Fourteenth Amendment. The learned court then cites *Reagan v. Trust Co.*, 154 U. S. 362. Here again we find a case of *diverse citizenship*, with no discussion of the principle involved in the problem under consideration in the Capital City case.

Then follows a citation of the case of *Hamilton Gas Light & Coke Co. v. Hamilton City*, *supra*, with the observation that that case

“justifies the assertion that the ordinance of a city, when passed in accordance with the forms of law and under assumed and asserted powers delegated to it, and in a direction wherein such powers might be delegated, is the ‘law’ of the state, within the meaning of that term as used in the constitutional provisions.”

We insist that the opinion in question does not justify the assertion quoted above. The Supreme Court did say, in the case of *Hamilton etc. Co. v. Hamilton*, *supra*, that “A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the states,” etc. But it by no means follows that the

court would have said that a municipal ordinance passed under supposed legislative authority, or under “assumed and asserted powers delegated” *was* to be regarded as a law of the state.

On the other hand, so far as appears, the court in the case of *Louisville v. Cumberland Tel. Co.* was considering an ordinance “passed in accordance with the forms of law.”

It was said by the court, in the course of its opinion (155 Fed. 730):

“That the common counsel ‘assumed’ and ‘claimed’ to have the power to do what it did do is self evident. The enactment of the ordinance is in itself, and from any point of view, an assumption and claim of right to do what it did.”

Yet the ordinance there in question was not deemed to be state action and federal jurisdiction was denied.

We think the authorities cited in *Capital City Gas Co. v. City of Des Moines* furnish no answer to the argument of defendants in that case, and no justification for the conclusion reached by the court.

Just at this point we may pause to observe that, in the course of his able argument, counsel for appellee made the point that the ordinance of the city and county of San Francisco was “*prima facie*” a law of the state of California. But is such *prima facie* validity sufficient?

The ordinances under consideration in *Louisville v. Cumberland Tel. & Tel. Co.*, *supra*, and in *Memphis v. Cumberland Tel. & Tel. Co.* were likewise passed under

the forms of law and pursuant to “assumed and asserted” power and were also *prima facie valid* so as to necessitate attack in the courts. Yet such *prima facie* validity did not make those ordinances acts of the state so as to confer federal jurisdiction.

Ozark Bell Telephone Company v. City of Springfield, 140 Fed. 666, a Circuit Court decision cited by appellee, expressly relies upon an *obiter* comment contained in the opinion in the case of Barney v. New York, 193 U. S. 430. When the Supreme Court in the Barney case used the language quoted by Marshall, district judge, that court was considering the decision theretofore rendered in Reagan v. Farmers Loan & Trust Company. As we have shown, the action of Reagan v. Farmers Loan & Trust Company was by non-resident stockholders. For that reason it was not necessary that the case should be one arising under the Federal Constitution or laws. There is no suggestion in the opinion that the action of the commission was void under state law, because unauthorized by the state. There is no discussion of the matter of “state action” within the meaning of the Fourteenth Amendment. Surely the *obiter* comment on the Reagan case, contained in the opinion in Barney v. New York, furnishes no sufficient reason for the decision in Ozark Tel. Co. v. Springfield.

In Des Moines City Ry. v. Des Moines, 151 Fed. 854, we find the court making the error of assuming that in questioning the existence of federal jurisdiction, the supremacy of the Constitution of the United States is attacked.

As we have elsewhere shown, the jurisdiction is questioned, not on the ground that the agent's act violates law, but on the ground that where it violates the State Constitution, the act is in excess of the state agent's authority, and is not the act of the state.

Raymond v. Chicago Union Traction Company, 207 U. S. 20, is much relied upon by appellee, and properly so, for, in our opinion, it is the one authoritative decision which lends support to the case for the appellee.

That the point here under consideration was raised in the Raymond case is apparent from the briefs of counsel, and that federal jurisdiction was declared to exist must also be conceded. What was the theory of the court and the basis of its decision? In the majority opinion the problem is not discussed on principle. The court tells us that:

"The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 21 L. Ed. 979, 17 Sup. Ct. Rep. 581."

This cannot be accepted, in its literal sense, and without qualification, as the decision of the court. To accept it literally and without qualification would make the decision at variance with *Barney v. New York*,

with the later case of *Memphis v. Cumberland Tel. & Tel. Co.*, and with every other decision where it has been held that one who, “by virtue of public position under a state government, deprives another of property,” *but without authority from the state*, does not perform an act constituting state action within the meaning of the Fourteenth Amendment.

Was there not present in the case that which may be deemed a prior authorization by the state—the mandate from the Supreme Court of the state. We have freely conceded and admitted that where an appeal has been made to the State Supreme Court, the body provided by the state to pass upon the authority of state agents and to interpret and apply the State Constitution, the declaration by that body that an act of confiscation is not such is equivalent in law to a ratification by the state, and makes the adopted act that of the state itself.

Where this appeal to the state court is made in advance, it is likewise equivalent to a prior authorization of the act.

In the statement of facts in the *Raymond* case it appears that the action taken was pursuant to mandate from the Supreme Court of Illinois. If this was true, it was a prior authorization by the state. That great weight was attached by the Supreme Court of the United States to the circumstance that the action of the board was pursuant to mandate from the state court is apparent from the dissenting opinion of Mr. Justice Holmes. In that dissenting opinion it is said:

“Notwithstanding my unfeigned deference to the judgment of my brethren, I cannot but think that the Circuit Court was wrong in taking jurisdiction

of this case. We all agree, I suppose, that it is only in most exceptional cases that a state can be said to deprive a person of his property without due process of law merely because of the decision of a court, without more. The discussion in *Chicago, B. & Q. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Supp. Ct. Rep. 581, concerned a judgment assumed to be authorized by a statute of the state, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the Fourteenth Amendment."

It is ~~not~~ apparent from the above statement that the alleged confiscatory action, involved in the Raymond case, was deemed to have had the sanction and approval of the state, through the declaration and mandate of the State Supreme Court, the body provided by the state to construe and apply the State Constitution.

That the prior authorization by the state was not deemed sufficient by the dissenting justices is apparent from that part of the dissenting opinion which follows the above quotation.

Those justices were of the opinion that notwithstanding the prior mandate, *the action taken* pursuant to it should first be questioned in a direct proceeding in the state court by the persons affected, before it could be deemed to have the sanction of the state.

Whether the case be distinguishable from the case at bar on the ground indicated or not, we insist that to give to the majority opinion the literal interpretation insisted upon by appellee is to place the case in apposi-

tion to numerous decisions of the Supreme Court, both earlier and later than the decision in question.

Without further consideration of appellee's authorities we pass to a few closing observations.

VI.

The Conclusion Does Not Follow that the Adoption of Defendant's Contention Herein Would Mean the Destruction of Federal Jurisdiction to Enforce the Guaranties of the Fourteenth Amendment.

It is said that the logical result of our argument would be the destruction of all federal jurisdiction to enforce the guaranties of the Fourteenth Amendment. It is argued that if a case in which denial of due process is charged were taken to the Supreme Court of the United States on appeal or writ of error to a State Supreme Court, and that court should therein determine that the charge were true, this would only establish, if our position here is correct, that the act complained of was done in violation of the State Constitution, and therefore without authority of the state, and so was not prohibited by the Federal Constitution or remediable by any federal court.

We cannot concede the accuracy of that reasoning.

It entirely omits from consideration the element of ratification. It has been our contention that an act of an alleged agent could not be deemed to be the act of its principal if it was found to be in excess of its authority; that the Constitution of the state was to be deemed to be in the nature of a general order to subordinate agencies of the state; that the alleged act of the municipality, in this case, could not be deemed to

be the act of the state, because in excess of the municipality's authority, and null and void under state law. It is to the city's principal, the state, that the Fourteenth Amendment is directed. When, however, the act of the city is called in question before the Supreme Court of the state—the body provided by the state to pass on such matters for the state, and that body determines that an act of confiscation is not such, then may it be said that the state has ratified and confirmed the confiscatory act and made it the act of the state. The injured party may then take his case to the Supreme Court of the United States, by writ of error, and rightfully complain that *his state* deprives him of his property without due process of law.

Seattle Electric Co. v. Seattle R. & S. Ry. Co.,
supra;

Virginia v. Rives, *supra*.

It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the State Constitution, before federal jurisdiction under the Fourteenth Amendment shall attach, would oust the inferior federal courts of original jurisdiction *in all similar cases*. Whether the operation of this principle should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the State Constitution, should be held to be the act

of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

The Supreme Court, however, has indicated that where one "acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state." (Raymond v. Chicago Union T. Co., 207 U. S. 20, 52 L. Ed. 78.) Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the State Constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be "clothed with the state's powers" is a matter we need not here consider. As stated by Judge Wellborn in his opinion in the case of Home Telephone & Telegraph Company v. City of Los Angeles, there is an important difference between the act of a state officer, acting for and in behalf of the state and in the name of the state, and the act of a subordinate agency, such as a city government which does not act for, or in the name of the state, and does not represent the state, except in a limited sense.

As to these subordinate state agents, at least, we submit that it would violate a thoroughly established principle of agency to hold their unauthorized acts to be the acts of the state.

Even if it be agreed, however, that the logical result of our contention would be the destruction of all original jurisdiction of the inferior federal courts, in cases

arising under the Fourteenth Amendment, we cannot see how that consideration is material. The court is here *applying* the law and the Constitution. It is not engaged in *making* either. It is applying a Constitution which says that no state shall deprive any person of property, not one which says that no person shall be deprived of property. Nor is it applying a Constitution which provides that no *city* shall deprive any person of property.

Let us not be led into an indefensible position in an effort to retain a jurisdiction which does not exist. If it is desirable that the inferior federal courts should have a jurisdiction that they do not lawfully possess, let the Constitution be changed.

As for the inferior federal courts, congested with a mass of litigation of this character which it was never intended that they should handle, and which should be taken care of in the state courts, they will doubtless grieve but little over its loss. They got along fairly well for over seventy years without the Fourteenth Amendment or any of the class of litigation that came crowding in upon them following its adoption. As for the litigant, we have shown that he has his remedy as against an erroneous state judgment which operates to deprive him of his property without due process of law.

In conclusion it is to be noted that

VII.

Any Reasonable Doubt as to the Existence of Jurisdiction Should be Resolved Against It.

If, from the examination of the authorities, and after consideration of the arguments submitted, this court should entertain a doubt on this question of jurisdiction that doubt should be resolved against the existence of jurisdiction. The interests of all parties would be best subserved by the court's declining to uphold a doubtful claim to jurisdiction.

It has been well said that:

“The courts of the United States have limited jurisdiction; that is, their jurisdiction extends only where the statute confers it. * * * The great mass or portion of jurisdiction over controversies resides in the state courts; and properly so, since all powers not delegated by the Constitution to the United States reside in the people of the states. Therefore, if jurisdiction is not clearly apparent in the federal courts, or if there arises reasonable doubt as to whether such courts have jurisdiction in any controversy those courts should not assume jurisdiction. It is very important, at the threshold of this action, that this question of jurisdiction be settled, for in the further progress of the action, in whatever appellate tribunal the action may be pending, if such tribunal should discover a lack of jurisdiction in the federal court, this action would be dismissed, and thus years of labor, and large expenses, might prove in vain. * * * Had plaintiff begun this action in the state court, instead of this court, that court would have had undoubted jurisdiction, and could have proceeded to judgment. The same allegations of fact which are made in bill herein as to violation of provisions of the Consti-

tution of the United States could have been there made; and if, in the progress of the litigation, the Supreme Court of the state had decided adversely to plaintiff's claim—that is, held the action of the City Council valid, and not violative of the federal Constitution,—plaintiff could have carried its contention as to this question to the Supreme Court of the United States for its authoritative, binding decision; and thus, through that channel of litigation, might the final decision have been reached in this controversy, and by the same tribunal wherein such final decision may be reached, if carried on in this court. This consideration makes the action of this court, if adverse to plaintiff on the subject of jurisdiction, not a deprivation of its right to have the controversy heard, but merely compels plaintiff to pursue its remedy through another court. Since, therefore, this action will be hereafter dismissed, if in this court, or in any court to which the action may be carried, it is determined that this court is without jurisdiction herein, and since other courts are open to plaintiff where the jurisdiction is unquestioned, this court ought not to proceed further, but at the very threshold should stop and refuse to act on the merits of the controversy, unless this court is clearly satisfied that it has jurisdiction. All reasonable doubts on this subject must be solved against such jurisdiction.”

Capital City Gas Co. v. Des Moines, 72 Fed.
819-20

As friends of the court we respectfully submit the above for its consideration. We think that the decision below was erroneous and should be reversed.

JOHN W. SHENK,

City Attorney of The City of Los Angeles;

GEORGE E. CRYER,

*Assistant City Attorney of The City of Los Angeles,
Amici Curiae.*

No. 2176

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO
(a municipal corporation) et al.,

Appellants,

vs.

SPRING VALLEY WATER COMPANY
(a corporation),

Appellee.

BRIEF OF APPELLEE

In Reply to Brief of John W. Shenk, City Attorney of the
City of Los Angeles, and George E. Cryer,
Assistant City Attorney of the City
of Los Angeles, *Amici Curiae*.

Because of the importance of the question involved, representatives of the City of Los Angeles were granted leave to file a brief in this case as *amici curiae*, and it was ordered that appellee might reply thereto. This brief is that reply.

The issue raised on this appeal has already been clearly shown, and we shall not here repeat our former

statement of the case. The question is purely one of law and may be accurately stated thus: Is the assumption of jurisdiction by the District Court of the United States warranted in a case in which it is made to appear that a California municipality, acting through its board of supervisors, has enacted an ordinance fixing rates to be charged for water which are unjust and confiscatory? This is the sole issue in the case, and the only question which any party interested has discussed. It is conceded that federal courts have jurisdiction in cases of this impression only when the relief asked is against action by the state, and that, if appellee has not stated a case in which it is shown that the State of California has acted, the order appealed from should be reversed. The question, the answer to which is essential to a decision in this case, is the following: "What is state action?"

Counsel for appellant base their entire argument upon the ground that the City and County of San Francisco, in passing the rate complained of, was an agent of the state, and that its authority was, because of the provisions of the constitution of California, one to fix reasonable rates only; that, if unreasonable rates were fixed, the action was unauthorized, and not that of the state. They, at first, carried their contention so far as to declare that no instrumentality of the state has power to enact a confiscatory ordinance, because of the presence in the constitution of the State of California of a provision similar to that found in the fourteenth amendment to the constitution of the United States; at the oral argument counsel receded from the position

at first taken, and admitted that, if the power to fix rates had been vested in the legislature by means of language identical with that employed in granting that power to the municipalities of California, the action of the legislature, pursuant to the authority thus given, would then, were the rate so passed confiscatory, have been state action. The excuse offered for the distinction made was, that in such a case the body exercising the power would have been "nearer" the state, and that there would not then have been a delegation of the peculiar character of that with which we are, in our case, dealing. We shall pass, for the moment, a discussion of the principle thus contended for.

The representatives of the City of Los Angeles do not make their admissions so sweeping, but their argument is the same. They, in much the same way, and, at times in the same language, insist that the problem is one of agency alone; that, for a principal to be bound, an agent must act in the exercise and within the limits of the power delegated; that the authority given by the state, in our case to its agent the municipality, is one to fix rates, but that that power is limited to an exercise which shall not deprive a citizen of property without due process of law, and that any exercise by a municipality which does deprive a citizen of property without due process of law is unauthorized and is not action by the principal, the state. Counsel thus state their contention:

"We submit that, according to elementary principles of the law of agency, the act of the City, and County of San Francisco, done in the exercise of its agency, but not within the limits of its authority, is

not the act of the State of California.” (Brief, p. 12.)

And,

“Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principal; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States.” (Brief, p. 26.)

This is the single argument which counsel urge as entitling appellant to a reversal of the lower court’s order. They fully appreciate the difficulties involved in applying the principle contended for when the legislature, instead of a municipality, enacts a law contrary to the provisions of the constitution and they refuse to definitely commit themselves as to whether action of that character is or is not state action, or to join in the broad concession of appellant which we have previously considered. They say:

“It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the state constitution, before federal jurisdiction under the fourteenth amendment shall attach, would oust the inferior federal courts of original jurisdiction in all similar cases. Whether the operation of this

principle should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the state constitution, should be held to be the act of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

“The Supreme Court, however, has indicated that where one ‘acts in the name of the state and for the state and is clothed with the state’s powers, his act is that of the state’. (Raymond v. Chicago Union T. Co., 207 U. S. 20, 52 L. Ed. 78). Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the state constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be ‘clothed with the state’s powers’ is a matter we need not here consider.” (Brief, pp. 43-44.)

We believe that the most superficial examination of the argument thus urged will demonstrate its error. The test required by it is the sanction of the state Supreme Court. If the ordinance complained of is determined to be unconstitutional, the state has not acted; if constitutional, the reverse is true. Federal courts, if this argument is sound, may take jurisdiction only in those cases in which the act complained of has received the approval of the state Supreme Court, and it necessarily follows that no ordinance is attributable

to the state until the Supreme Court of the state has held it to be constitutional. The rule applies to actions by all state instrumentalities whether valid or invalid. If an ordinance is not the act of the state until it is determined to be constitutional, an act of that character can only be action by the state after such determination, and in no case of the kind here considered may the state be said to have acted before the sanction of the Supreme Court has been had. The Supreme Court is then the actor, not the legislature or the municipality. We need hardly point out that this is making the judiciary perform a legislative function which is not contemplated or warranted by the organic law of this state.

Examining the argument from another angle, we find that by its adoption federal courts would be deprived of *all* jurisdiction in cases of this character. It is conceded by counsel that they are denied all *original* jurisdiction, but it is contended that because of the ratification by the state Supreme Court, the Supreme Court of the United States would be warranted in assuming jurisdiction in those cases which may be brought to it by writ of error. This suggestion entirely ignores the very basis of the argument advanced. The contention is that the state has not *acted* if the act in question violates the state constitution. The federal constitution, it is admitted, only affords relief against state action, and it is apparent that if the Supreme Court of the United States determines that notwithstanding the sanction of the state court, the law violates a prohibition of the state constitution, it must hold that the law is not a law of the state and is not state action. Thus, in no

case submitted to it, where it is alleged that a state is depriving a citizen of property without due process can that court grant relief, for as soon as it finds the act to be unconstitutional it, by that finding, determines that the state has not acted, and, hence, that it is without jurisdiction to determine the issues raised in the case. The principle of ratification is inapplicable since jurisdiction may only be assumed where it appears that the state has acted, and counsel says without qualification that the state may not be said to have acted in a case in which the action, if enforced, will violate a constitutional prohibition.

Furthermore the argument itself is founded upon an entirely erroneous assumption. The contention is, that we have pleaded that the rate complained of is confiscatory and that the passage of confiscatory and unreasonable rates is prohibited by the California constitution. We did plead that the rate prescribed by the ordinance was unreasonable and confiscatory *under the constitution of the United States*. We did *not* plead that it was so under the constitution of the State of California. The distinction between these two statements is marked, and is strikingly illustrated by actual decisions. The reasonableness and justice of a given rate depends upon the rate of return it will yield. The determination of the fairness of the rate, therefore, is the controlling factor in deciding whether or not its enforcement will deprive complainant of its property without due process or adequate compensation. What is a reasonable rate depends upon the decision of the court appealed to. The Supreme Court of California

has held in a recent case that a return of 5 per cent is not unreasonably low.

Contra Costa Water Co. v. City of Oakland, 159 Cal. 323,

while the Supreme Court of the United States, in

Willcox v. Consolidated Gas Co., 212 U. S. 40; 54 L. Ed. 382,

held that a return of less than 6 per cent is unfair. Various other federal courts have found a similar unfairness with regard to rates yielding less than 7 per cent. What may be held confiscatory under the federal constitution in a federal court may not be held unreasonable by a state court in interpreting a state constitution. The only injustice we complain of is an act which violates the guaranties of the constitution of the United States. We do not plead that any provision of the state constitution has been violated, and there is no ground warranting the assumption that, in passing that rate, there was such a violation. For this reason it is submitted that, assuming counsel's entire argument to be valid, it has no application to the case at bar.

Let us, however, assume that our pleading does state a case in which it appears that the municipality, in passing the rates complained of, violated the provisions of the constitution of the State of California. We insist that there is still a showing that the state has acted within the meaning of the fourteenth amendment.

Counsel have, we believe, entirely misconceived the relation which a municipality in California, when exercising its power to fix water rates, bears to the State of

California. As we have already stated, counsel assume that a municipality is, in the performance of that duty, acting purely as an agent of the State of California, and that it is an agent whose authority is limited, and which cannot bind its principal if it acts in excess of the authority granted. If we are to follow counsel strictly, we must concede that, under these circumstances, a municipality is acting as any ordinary agent to whom a principal has committed a certain duty to be performed. Counsel say:

“It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent’s authority measures the principal’s responsibility.” (Brief, p. 8.)

We shall first consider the validity of this argument and determine whether a municipality, in the performance of its duty in fixing water rates, is acting as an agent and governed by the ordinary principles of agency, and then discover whether, if the relation of principal and agent be assumed, the municipality is unauthorized to fix confiscatory rates.

NO PRINCIPLE OF AGENCY IS INVOLVED.

A state acts through instrumentalities; it is an entity whose laws can only be passed, and whose acts can only be performed by some human agency. Those acts which are admitted without question to be acts of the state are always, in fact, those of some instrumentality

of the state. Such is the case when a state legislature passes a valid law. So, too, a corporation, while it acts as an entity, does, in fact, act through its board of directors. Such instrumentalities act for and are the state and the corporation, as the case may be. There are no principles of agency involved, for in each case the principal is acting. So, in the case of the state, there is no delegation of power, for the principal itself is the actor. We fully appreciate that the terms "agency" and "an agency of the state" are often employed in cases where the state is acting. More accurate expression would require the use of the word "instrumentality", but in every well-considered case it is apparent that the terms connote no ordinary agency, but simply a means by which the will of the state is expressed. When the instrumentality, upon which the supreme law of the state imposes a duty, acts, the state is, itself, acting. That instrumentality is, for the purposes of that action, the state. Neither of the terms above referred to involves in any way the principle of agency for which counsel contend. In determining whether a state has acted, the theory of agency may become important, but it is only when the instrumentality, which, under the organic law of the state, is given the law making power, delegates to some other body the authority originally granted to it, that such is the case. Such an instance is found when the constitution provides that the legislature shall have power to pass certain laws, and the legislature appoints some other tribunal to perform that very act. The power which it was intended should be exercised by an

instrumentality of the state is, in such a case, actually exercised by an agent of the instrumentality. In that case, as we have said, the principles of agency might be applicable.

Testing the problem of this case by the rule above stated, we find this state of facts: The organic law of the State of California, its constitution, provides that rates to be charged for water shall be fixed by the various municipalities acting through their board of supervisors. Those boards, like the state legislature, derive their power to act directly from the constitution. They are, to answer appellant's contention, removed exactly the same distance from the constitution when fixing water rates that the legislature is when it passes laws. No one has ever contended that a legislature, to whom is given the law-making power of acting for and in the name of the state, does not act for the state, nor that its action is not state action, because, in passing the law whose validity is questioned, it failed to act within constitutional limitations. The state, as has in countless instances been determined, has acted, but it has acted without due heed to the constitution and the law is unconstitutional. So it is in the case of a municipality when it fixes water rates. It is acting under a constitutional grant within the domain of fixing water rates, and when its act is completed, the state itself has acted. Furthermore, the state has *acted*, irrespective of the question as to whether or not the act is enforceable or constitutional. Those are questions which test the correctness of the act, but they are not determinative of its performance. The act is per-

formed when the municipality passes the ordinance, just as it is completed when the legislature passes a law.

Nor does the fact that an action of the state may be declared unconstitutional and unenforceable render the act itself any the less state action. In such a case it is conceded that a law has *prima facie* validity (brief, *amici curiae*, 37) *until* its unconstitutionality is established, and it is only when the judicial department of the government determines that it is invalid that it becomes unenforceable. If this is so, it is apparent that what we have previously said is true,—the state has acted and its act gets recognition, but, not being within constitutional limitations, it may not be enforced. The judiciary interprets whether checks imposed by the organic law have been heeded, but its decision on that question does not affect the other, as to whether or not the state has acted. That question is tested in an entirely different way. It is definitely answered in the affirmative if it is made to appear that an instrumentality of the state, to which is entrusted the law-making power within a given domain, has acted; while, if the showing is that an instrumentality to which that power was given has delegated to another tribunal, the test then to be applied is as to whether or not the law in question was passed under an assumption of, under color of, or pursuant to authority granted by the state.

Counsel, on the other hand, propose to determine in each case the question, as to whether there has or has not been state action, by ascertaining whether or not the action is or is not constitutional. If it is, then they

concede that the state has acted; if it is not, they declare that there has been no state action. The vice in this method of reasoning is that it tests each action by its legality.

It is our contention that, in every instance where the organic law of the state imposes upon a certain body the broad power and duty to act within a certain general field in the state's behalf, and leaves to that body a discretion as to the exercise of the duty, that act, if so performed, is the act of the state. That contention is, we submit, fully supported by the authorities. In no federal case which has come to our notice has an act, alleged to be that of a state, been determined not to be such, where the act was performed by an instrumentality of the state to which the organic law gave the power to perform an act with regard to the subject matter concerning which it, in fact, acted. In such a case, the test of agency has never been applied. Such an act has, however, definitely, and in numerous cases, been determined by the Supreme Court of the United States to be that of the state.

In *Ex parte Commonwealth of Virginia*, 100 U. S. 339, 25 L. Ed. 676, that court, speaking through Mr. Justice Strong, said:

“We have said the prohibitions of the 14th Amendment are addressed to the states. They are: ‘No *state* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.’ *They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be*

taken. A state acts by its legislative, its executive or its judicial authorities. *It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The portion of the opinion above quoted was expressly referred to and approved by Mr. Justice Matthews in

Neal v. Delaware, 103 U. S. 370; 26 L. Ed. 567.

In discussing the same subject in

Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226; 41 L. Ed. 979,

the same court speaking through Mr. Justice Harlan said:

"It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative,

executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' "

The language above quoted received a fourth approval in.

Raymond v. Chicago Union Tr. Co., 207 U. S. 20;
52 L. Ed. 78,

where the court by Mr. Justice Peckham said:

"The claim that the action of the state board of equalization in making the assessment under consideration was the action of the state, and if carried out would violate the provisions of the 14th amendment to the constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a federal question beyond all controversy.

* * * * *

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation.

* * * * *

"*Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state.* The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state

government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state."

THE MUNICIPALITY WAS ACTING WITHIN ITS POWER.

If, however, it is assumed that the City and County of San Francisco was acting as the agent of the State of California, it is equally apparent that the action of that municipality in enacting the ordinance complained of was action by the state. Conceding for the moment the correctness of the theory contended for, we find a case in which the state has, in its organic law, provided that that municipality shall fix rates to be charged for water within its limits. Full authority to act for the state with regard to that subject matter is given and the broadest discretion is imposed.

The only question as to the validity of the exercise of the power thus bestowed arises because of the following provisions of the state constitution.

Article I, Sec. 13:

"* * * No person shall * * * be deprived of life, liberty, or property without due process of law. * * *"

Section 14:

"Private property shall not be taken or damaged for public use without just compensation. * * *"

How either of these provisions may be said to constitute a limitation upon the “power” of the state to enact a law, it is difficult for us to appreciate. The aim of these provisions was not to limit the power of the state but to defend the individual. They supply a means of protection to the individual against unjust encroachment upon his rights, but they do not pretend to, nor do they, limit the power of the state to act. They do not even say that the state shall pass no law which shall violate certain guaranties, but they say that those guaranties shall not be violated. In the very nature of things those guaranties cannot be violated until the law complained of is *enforced*. An ordinance by its mere passage deprives no one of his property; it is its enforcement which works the injury. So, if the legislature passes an unconstitutional law, we cannot say that the state has not acted but only that that law, because of its unconstitutionality, shall not be enforced. The constitutional provisions referred to are, in other words, not limitations upon the authority of the state, but checks upon the enforcement of laws which it may enact.

Were this not so, however, and were they, as counsel put it, in the nature of a “general order to agents”, it is submitted that the state has still acted. Full power to act is given with an order that the action shall not, if enforced, result in depriving an individual of property without due process of law,—in other words, that the state shall not act illegally. The principal is in effect attempting to protect itself by instructing the agent not to break the law. Such an instruction, coun-

sel themselves concede, does not serve as a protection in case legal requirements are not observed. They say (brief of *amicus curiae*, page 30):

“No one would contend that the law of the state should be read into and become a part of a private principal’s instructions to his agent, thereby limiting the powers of the agent. If that were true, no agent could ever violate the legal rights of another person by authority of his principal. ‘The bane and the antidote would go together.’ ”

The situation is, we submit, not dissimilar to the one where a street railway corporation orders its conductors to run its cars and collect fares, and prescribes a rule, among others, that he shall not eject a passenger who has paid his fare. If a conductor disregards these instructions and does eject a passenger who has paid his fare, his act is, notwithstanding the prohibition, that of his principal and the company is bound. The reasoning is apparent. “Full and plenary power” to act with regard to a certain subject-matter has been given, and any act with regard to that subject-matter is the act of the principal.

We have attempted to meet the general argument of counsel rather than to examine and reply to specific portions of their brief. Many statements which are made therein are on their face inaccurate, as, for instance, the one at page 14, that the ordinance in our case can be determined to be void only “because it is unauthorized and contrary to the supreme law of the state”; but all such statements are advanced in support of the proposition that the relation of principal and agent is involved and that the principles of the law

of agency are applicable. This we submit is not the case.

THE DECISIONS OF THE FEDERAL COURTS.

We believe that what we have already said furnishes a complete answer to the argument of appellant and amici curiae, but we cannot allow certain criticisms of our first brief to stand unchallenged. We are charged first of all with having argued our case without regard to principle and “wholly from the standpoint of authority”; and it is then claimed that the authorities do not support the contentions we have made.

We have no excuse to offer for our belief that the issue now before the court is one to be determined entirely by an application of rules already laid down by federal courts. We have been impressed with that belief from the time the question now under discussion first arose, and we find nothing in counsel’s brief to make us change our minds. We submit once again that the decisions of the federal courts furnish a complete answer to the issue now before this court and fully support our contention that the lower court acted correctly in assuming jurisdiction.

Let us examine counsel’s ground for asserting that we are wrong in this contention. It is correctly stated by counsel that the case of *Raymond v. Chicago Union Traction Company*, *supra*, “is much relied upon by appellee” and it is candidly admitted that it is an “authoritative decision which lends support to the case for the appellee”. It is conceded that “the point here un-

der discussion was raised in the Raymond case and that federal jurisdiction was declared to exist''. It is apparent that if this decision states the rule by which this court will be bound, the order appealed from must be affirmed. It, therefore, becomes of vital importance to ascertain the reasons urged by counsel for its not being a binding authority in the case at bar. Those reasons are: (1) That the decision announces a different rule from that laid down in *Barney v. New York* and other cases decided by the Supreme Court of the United States; (2) That the action taken was pursuant to the mandate of the Supreme Court of Illinois, had, therefore, received the final sanction of the state, and was state action.

The rule referred to is the one stated in the following portion of the opinion of the court delivered by Mr. Justice Peckham:

“The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state.”

Answering the ground first assigned by counsel in support of the argument that this principle is not the true one, we are forced to meet the suggestion that the decision is inconsistent with other decisions of the Su-

preme Court. We find no warrant for this argument. Language practically identical with that above quoted was used before this case was decided, in three other decisions of that court, and the question of jurisdiction was determined by applying the test approved in this case.

Ex parte Commonwealth of Virginia, supra;
Neal v. Delaware, supra;
Chicago, B. & Q. Ry. Co. v. Chicago, supra.

The rule, thus laid down, plainly is that the state may be said to have acted when one of its instrumentalities, acting within the scope or purpose of its office and with regard to a subject-matter over which it has been given power to act, takes such action as will, if not prevented, deprive a citizen of a right protected by the 14th Amendment.

The rule followed in the Raymond case has not only, in four separate instances, received the direct approval of the Supreme Court, but it is in no way inconsistent with the principles announced in the Barney or Cumberland Telegraph cases. The former dealt with a situation in which the action complained of "was not only unauthorized, but was forbidden by the legislature", and the court found that "the defendants were proceeding not only in violation of provisions of the state law, but in opposition to plain prohibitions". That decision supports the rule of the Raymond case and does not in any way militate against it.

In the Cumberland case, on the other hand, it was alleged that no provision of the state constitution or of the state law delegated the power which the municipi-

pality attempted to exercise, and there was nothing upon which to even found a claim that the state had acted. Even in this extreme case the court, speaking through Mr. Justice Lurton, was careful to say:

“If it shall turn out that the common council did have general power to regulate the charges of telephone companies rendering services within the City of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract or by imposing rates which are unjust and confiscatory, a federal question may arise.”

Counsel's statement that, to accept the doctrine of the Raymond case

“would make the decision at variance with *Barney vs. New York*, with the later case of *Memphis vs. Cumberland Tel. & Tel. Co.*, and with every other decision where it has been held that one who ‘by virtue of public position under a state government deprives another of property’, but without authority from the state, does not perform an act constituting state action within the meaning of the Fourteenth Amendment”, (Brief, p. 39)

is, therefore, it is submitted, entirely incorrect and finds no support from an examination of the cases referred to. The rule of the Raymond case is the one always heretofore followed and applied.

The second argument of counsel has, it seems to us, even less force than the first. It is true that the state instrumentality had, in this case, before the action complained of was taken, failed to perform the duty of making assessments imposed upon it by the state law, and that the Supreme Court of the State of Illinois

had ordered it, pursuant to mandamus proceedings, to perform that duty. The writ of mandate issued by that court was, however, only an order to levy an assessment. It was not an order to levy an invalid assessment or to levy one similar to the one which was, in fact, finally levied; and the assessment in question because of its illegality violated the mandate of the Supreme Court of Illinois as well as the prohibitions of the state and federal constitutions. How it can, with any foundation of fact, be contended that the act complained of had received the sanction of the Supreme Court or been ratified by the State of Illinois it is difficult for us to appreciate. It is certain that neither the majority nor the dissenting opinion in the Raymond case furnishes any basis for that argument.

That case is the only one of the decisions of the Supreme Court referred to in our brief which counsel have felt called upon to consider. The others they dismiss with the observation "We have neither the time nor the inclination to review all of the cases cited by counsel". We believe that the other seven decisions of that court furnish additional authority for the argument we make.

Counsel do, however, at some length, consider four federal decisions to which we referred:

Citizens' St. Ry. Co. v. City St. Ry. Co., 56 Fed. 746;

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 854;

Ozark-Bell Tel. Co. v. City of Springfield, 140
Fed. 666;

Capital City Gas Co. v. City of Des Moines, 72
Fed. 818.

The first of the cases above cited is criticized on the ground that it does not appear that in that case there was a provision in the constitution of Indiana prohibiting the passage of a law impairing the obligation of contracts, and that the claim advanced in the case was only the one that a provision of the federal constitution had been violated. Conceding that counsel's contentions are correct, they do not, to our minds, weaken the force of that decision as an authority in the case at bar. It is apparent that the situation which the court was considering was practically the one with which this court is now dealing. The provisions of the federal constitution are, and were when this case was tried, the supreme law of Indiana. If the supreme law of Indiana is deemed to contain a provision similar to that of the 14th Amendment, and yet a subordinate instrumentality of that state is held to have acted as and for the state, even though violating the supreme law of the state, it seems apparent to us that a similar act by the same instrumentality would be construed to be state action, were the prohibition against the deprivation of property without due process of law definitely made a part of the state law.

In so far as the three other cases, above referred to, are concerned, counsel do not question that they are in direct support of our contention in this case, but they argue that the decisions are not supported by the au-

thorities upon which they purport to rely. There is no pretense that the cases themselves do not support the argument for jurisdiction. In view of this fact and the authority furnished by the Raymond case and other decisions of the Supreme Court, we shall not lengthen this brief by a discussion of them.

Since our first brief was written, a decision of the District Court of the District of Delaware, which supplies strong support for the contention we have made in this case, has come to our notice.

Wilmington City Ry. Co. v. Taylor et al., 198 Fed. 159, 169.

Because of the full consideration given to the question now before this court and the satisfactory disposition of arguments similar to those now urged by appellant, we quote as follows from the opinion of Judge Bradford:

“(2) The utility board is an instrumentality of the state of Delaware for the accomplishment of public purposes and its acts in and about matters committed to it are the acts of the state. The suggestion that in so far as such an instrumentality acts irregularly, wrongfully or illegally it does not represent the state, because the state has not authorized it so to act, is utterly unsound. If it were otherwise the fourteenth amendment would possess no practical efficiency with respect to the action or threatened action by such instrumentality; for no relief could be had under that amendment against irregular, wrongful or illegal action taken or threatened by it, while in the absence of such irregular, wrongful or illegal action there would be nothing to complain of and consequently no occasion for asking or possibility of obtaining relief. The material consideration is whether the state in-

strumentality in denying a person or depriving him of the protection of the amendment is acting *virtute officii*, or proceeding under the grant of authority given it by the state, or within the general scope of its functions, and not whether in so acting it is acting irregularly, wrongfully or illegally.” * * *

“At the conclusion of the hearing on the present application the counsel for the utility board referred to *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, and *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 Fed. 365, 107 C. C. A. 421. The former case does not seem to have any pertinency to that before the court. There a bill had been filed to enjoin the city of New York, the board of rapid transit commissioners, and others from proceeding with the construction of a certain rapid transit railroad tunnel in a place not included in the ‘routes and general plan’ adopted with reference to the construction of such tunnel, on the ground that it would deprive the complainant of his property without due process of law in violation of the fourteenth amendment.” * * *

“The proceeding there sought to be enjoined was not within the grant of authority conferred. But here the utility board, although acting irregularly and wrongfully, was proceeding under the grant of authority given it by the state to ‘hear and examine complaints concerning rates * * * and to make such recommendations and orders as it may deem proper concerning such rates.’ The distinction in principle between the present case and *Barney v. City of New York* plainly appears from the latter portion of the opinion in that case. The New York case wholly fails to establish the proposition that the action of the utility board in making the order complained of was not the act of the state. *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 Fed. 365, 107 C. C. A. 421, was decided by the circuit court of appeals for the ninth circuit. In the court below a street railway company had

obtained a preliminary injunction against another street railway company, restraining the latter from constructing a railway on Rainier avenue in Seattle, under an ordinance of that city, on the ground that the complainant, which had for many years been operating a line of railway along that avenue under an earlier franchise, would by the ordinance obtained by the defendant and such construction be greatly damaged and deprived of property without due process of law in contravention of the constitution of the United States. On appeal from the interlocutory decree the circuit court of appeals held that the franchise granted to the complainant was not exclusive, and that, as under the franchise granted to the defendant compensation was required to be made for damages occasioned by the laying of tracks, the latter ordinance did not conflict with the constitution of the United States and therefore the court below was without jurisdiction to entertain the suit. But instead of resting the decision upon that ground the court unnecessarily went further and said:" (quoting from the opinion)

* * * * *

"Several things may with propriety be said of this holding. In the first place, it was wholly unnecessary to the determination of the case; the decision being fully supported on the first ground. Second, the cases cited in support of the proposition do not sustain it. They are *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, which has already been considered, and *Hamilton Gaslight Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, where it was held that a city ordinance not passed under legislative authority is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."

* * * * *

"These two cases fall far short of the proposition advanced in *Seattle Electric Co. v. Seattle*,

R. & S. Ry. Co., and at the same time are clearly distinguishable from the case in hand. While in those cases there was either a legislative prohibition or a lack of legislative authority to construct the tunnel or pass the ordinance, here there is no question as to the legislative authority of the utility board to regulate rates by making 'such recommendations and orders as it may deem proper concerning such rates.' This distinction was clearly recognized by the circuit court of appeals for the sixth circuit in *City of Louisville v. Cumberland Tel. & Tel. Co.*, 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500, where it was held, as stated in the syllabus, that the circuit court of the United States has no jurisdiction to enjoin the enforcement of a municipal ordinance on the ground that it impairs the obligation of a contract or deprives the complainant of property without due process of law, in violation of the constitution of the United States, when the bill alleges that no power had been granted to the municipality by the constitution or legislature of the state to pass such ordinance."

* * * * *

"As before stated, here the state has conferred authority upon the utility board with respect to the regulation of rates. Third, the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* seems essentially unsound. While the constitution of a state is, subject to the constitution and laws of the United States, the supreme law of the state, the constitution of the United States is the supreme law of the land, and within the scope of its operation, the supreme law of the state to the exclusion of any inconsistent provisions in the state constitution or laws. The prohibition of the fourteenth amendment relating to due process of law is self-executing and its scope and force can neither be increased nor diminished by any state. But it does not destroy the state or its instrumentalities. In declaring

that no state shall deprive any person of life, liberty or property without due process of law, it prohibits action by the state through any of its instrumentalities which would have that result, and whether the state constitution does or does not contain a similar prohibition is wholly immaterial on the question whether action by a state instrumentality is action by the state and as such forbidden by the amendment. The prohibition of the amendment having precisely the same force and operation in the absence, as in the presence, of a similar prohibition in the state constitution, if in the former case any given action by a state instrumentality would be the act of the state, it would equally in the latter, other things being equal, be the act of the state. The co-existence in the federal and state constitutions of similar prohibitions is unimportant on the question of authority to represent the state, and consequently on the question of jurisdiction of the circuit court, now the district court, of the United States. Fourth, it is difficult, if not impossible, to reconcile the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* with the fact that the Supreme Court of the United States has in many cases, of which a number have been hereinbefore cited, recognized and upheld the jurisdiction of the circuit court of the United States over suits for injunctive relief against the orders or legislative action of commissions and other state instrumentalities, based on the constitutional prohibition in question, in states creating such commissions and instrumentalities and having a similar prohibition in their constitutions. Illinois, Michigan, Minnesota, Virginia, Washington and other states are in this category, each having the constitutional prohibition that 'no person shall be deprived of life, liberty, or property without due process of law.' Fifth, the circuit court for the northern district of California in *San Francisco G. & E. Co. v. City, etc., of San Francisco (C. C.)*, 189 Fed.

943, repudiated the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* in a carefully considered opinion by Judge Van Fleet."

As we stated in our first brief on this appeal, we do not feel that the opinion of this court in the *Seattle* case announces the rule which Judge Bradford thought it did. We think that the decision of the court in that case is sufficiently explained by applying it to an ordinance passed without, and not under color of, state authority, and that it is not an authority for the position of appellant in this case. Judge Bradford, in his opinion, however, has so clearly presented the arguments against the position so taken by the appellant that without regard to his application of this argument to what he conceives to be the rule laid down in the *Seattle* case, it seems to us that his opinion cannot fail to be of great value in a consideration of the question now definitely raised.

It is respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted,

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